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United States
1 1309
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN THREE VOLUMES.)

ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

VOLUME II.
(Pages 385 to 768, Inclusive.)

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

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(Testimony of Frank Harris.)

Q. All right—was there quite a pile of rocks there when you were there on the 2d day of January? A. No, sir.

Q. You are positive about that? A. I am, sir.

Q. Just as positive of that as you are of anything else that you have been testifying to?

A. Yes, sir.

Q. That it wasn't there? A. Yes, sir.

Q. I am referring to the pile of rocks that appears to be right about under the spout there?

A. Right here, Mr. Hellenthal, is it not?

Q. Yes, that pile right under the spout.

A. That is the one I had reference to.

Q. On Plaintiff's Exhibit "J" the pile of rocks that shows there right below the spout, wasn't there when you were there on the [324] 2d day of January, 1920—that is right, isn't it?

A. That is right.

Q. Referring again now to Exhibit "J," I want you to tell me where that hole was that had been washed in there under the spout—where it would show on that picture.

A. This looks better, Mr. Hellenthal.

Q. That is the same picture.

A. The same picture?

Q. Yes, isn't it? A. I should say not.

Q. Was that pile of rocks there under the spout when you were there?

A. Not that I have any recollection of. This spout is familiar, though.

Q. That spout looks better to you?

(Testimony of Frank Harris.)

A. That is it.

Q. But the rest of the picture—the ground under the spout—is that any different?

A. Well, from this picture it looks as though there was brush there, but this picture might have been taken on an angle that shows that brush.

Q. Was that pile of rocks there when you were there on the 2d day of January, 1920—the pile of rocks that shows on Exhibit “F,” right under the spout?

A. I couldn't say that that is right under the spout, Mr. Hellenthal—that might be off to one side, from looking at this picture.

Q. Was that pile of rocks there, whether it was to one side or under the spout, regardless of where it was, was that there?

A. From where I was I don't suppose I could see that.

Q. You were not at a place where you could see that pile of rocks then, is that true?

A. If this pile of rocks, Mr. Hellenthal, was at the mouth of that flume or this trommel evidently I would have seen them because I could see the mouth of the chute here.

Q. That picture shows pretty well where that pile of rocks is, doesn't it? [325]

A. Sure, the picture shows the pile of rocks, I presume, or whatever it may be.

Q. That shows pretty well where that pile of rocks was with reference to where you were, don't it? A. No, Mr. Hellenthal.

(Testimony of Frank Harris.)

Q. Where were you?

A. I was right up over the trommel, on the board walk.

Q. You didn't go down?

A. I looked down, certainly.

Q. But you didn't go down?

A. No, there was no need of going down, Mr. Hellenthal.

Q. There is no need of going anywhere.

A. I couldn't see this pile of rocks. There was no need for these rocks to be right underneath the mouth of the trommel.

Q. You could see those rocks if they were there?

A. Certainly I could if they were right where the mouth of the trommel dumps down on the ground.

Q. Were those rocks there on the 2d day of January when you were there?

A. No, they weren't there.

Q. Where was that hole that you were talking about with reference to that pile of rocks?

A. Right where a volume of water might throw out and hit the ground—perhaps 7 or 8 feet from the mouth of the trommel.

Q. Where would that hole be with reference to that pile of rocks?

A. I couldn't tell from this picture, Mr. Hellenthal—if this picture was taken up and down hill I could tell you more about it.

Q. Calling your attention again to Exhibit "E"

(Testimony of Frank Harris.)

and Exhibit "G," that shows the same spout, doesn't it?

A. Well, Mr. Hellenthal, this spout here looks similar to that but it is in a different shape—it is turned at a different angle here.

Q. Yes, the picture is taken from a different place? [326]

A. Yes, a blind man could see that.

Q. But it is the same spout, isn't it?

A. I couldn't say as to that—might be a different piece of iron than it is here—I couldn't swear to that, you know.

Q. It looks pretty much the same, doesn't it?

A. Sheet iron, I presume, from the picture.

Q. Will you indicate to me on any one of those pictures where that hole in the ground was?

A. No, I cannot, Mr. Hellenthal.

Q. No?

A. Because they are not taken at the right angle.

Q. Do you think you could go up on that hill with the jury and show the jury where that hole in the ground was?

A. If the evidence had not been destroyed I certainly could.

Q. Do you mean to tell me that that hillside is any different than it was at the time you were there?

A. I haven't been up there since the penstock was taken away, but I would like to take a walk up.

Q. The hillside is there for you. A. All right.

(Testimony of Frank Harris.)

Q. I want you to tell me what other evidences you saw at the penstock at that time—was it just a hole or a ditch?

A. It was a ditch, 18 or 20 inches wide, and perhaps 6 or 8 inches deep, to the best of my knowledge and belief.

Q. And that was running right from the spout of the penstock down hill, is that right?

A. Right where the water might come out of the penstock and hit on the earth. It has a drop of I should say not over 7 feet, and this trommel laid on about a 45, I should judge.

Q. And right there where it struck was a hole, how deep, now?

A. There was a place cut right down the hill.

Q. There was a hole where it first hit, wasn't there? A. Certainly.

Q. How deep? [327]

A. I couldn't exactly judge that. Of course the hole wasn't exactly square or it wasn't exactly round.

Q. No, but how deep into the ground?

A. I couldn't say as to that at the time—I couldn't tell, Mr. Hellenthal, to tell the truth.

Q. Can't you tell me approximately—you can tell within a foot, can't you?

A. I don't think it was cut down over a foot.

Q. Not over a foot?

A. No; I would say somewhere about a foot.

Q. And that trench ran right down the hill a foot deep?

(Testimony of Frank Harris.)

A. No, not a foot—you asked me where this water hit.

Q. How deep was it where it ran down the hill?

A. As I explained to you, 18 or 20 inches wide, and 6 to 8 inches deep.

Q. And that trench ran right down that hill how far?

A. There was a grassy place there from the mouth of the trommel—I should say 20 or 30 feet before it hit the brush.

Q. And that trench was 20 or 30 feet long?

A. Yes, sir.

Q. And that was there when you were there on the 2d of January, is that right?

A. Yes, sir.

Q. Will you do me the favor of going up that hill and seeing if that trench is there now?

A. I will go up with you any time, Mr. Hellen-thal.

Q. No, I am not going up there myself. Where would that trench run on this picture, referring to Exhibit "G,"—I want you to show me where that trench would run?

A. Mr. Hellen-thal, now the mouth of this spout here is not in the same direction as it was on the 2d of January.

Q. The mouth of that spout isn't running in the same direction as it was on the 2d of January?

A. No, sir.

Q. That is true, is it? [328]

A. Yes, sir.

(Testimony of Frank Harris.)

Q. And you are just as sure of that as of anything else you have testified to, I suppose?

A. Yes, sir.

Q. Referring to Exhibit "G," in what direction was it on the 2d of January?

A. You have it right here,—here it is.

Q. On Exhibit "F" it is pointing in the same direction it was on the 2d of January, you think?

A. That is right.

Q. Where did the trench run with reference to that spout?

A. If this picture was taken up and down the hill instead of lengthwise of the hill I could tell you exactly, but it is taken the wrong way.

Q. The spout shows on that picture, doesn't it?

A. The spout shows.

Q. The place where the water hit the ground shows there, doesn't it?

A. How can it show in a bunch of brush, the way it is here? The way this picture is taken there is brush, but there is no brush between the penstock and out here a ways.

Q. The trench that you saw on January 2d last ran where the brush is now in the picture, is that right? A. No, not quite.

Q. Where is it, then?

A. It isn't here Mr. Hellenthal—you cannot see it—this picture isn't taken right to show it. If that picture was taken the other way, up and down the hill—

Q. All right. The spout in that picture comes

(Testimony of Frank Harris.)

right towards you, don't it? A. Certainly.

Q. That water would hit the ground on Exhibit "G" in the fore part of the picture, wouldn't it?

A. Certainly. [329]

Q. Do you see any trench there?

A. Mr. Hellenthal, I don't know just exactly how far this brush is away from this penstock. This might be 50 or 60 feet away, for all I know.

Q. Yes, but it doesn't look that way to you, does it?

A. I don't know—here it don't—there is quite a distance there—any man can see that.

Q. Might be 200 feet for all you know, might it not?

A. I suppose it was somewhere between the Bergman Hotel and the penstock.

Q. All right—let us look at another picture. Let us look at Exhibit "G," and we will assume now that that spout on Exhibit "G" is the real spout—the real thing—tell me, where is the hole on that picture—where is the trench?

A. You cannot see it here, Mr. Hellenthal.

Q. You cannot see it? A. No.

Q. Let us look at Exhibit "E," where would the trench and the hole be there, assuming now that that is the real spout—the real thing?

A. Was this taken at the penstock?

Q. Well, we will assume that it was.

A. I cannot, no, sir—I cannot see anything about that, Mr. Hellenthal.

Q. That doesn't look to you as though it was

(Testimony of Frank Harris.)

taken there, but we will say that it was taken there—where would the trench be in that picture?

A. Where is the trommel here, Mr. Hellenthal?

Q. You see the spout, don't you?

A. No, I don't—that might be a piece of board for all I know.

Q. This might be a piece of board? A. Yes.

Q. But we will assume now that that thing that looks like a spout is a spout and that this is really the penstock, and [330] that that is the place where you were on January 2d—now where is the hole?

A. Which way is this spout facing, Mr. Hellenthal?

Q. You can see it there?

A. No, I can't—I can see what you call the spout, but I cannot see which way the picture was taken.

Q. It looks right towards you, don't it, pretty nearly? A. No, it don't.

Q. You can see where the water would hit, can't you, coming out of there?

A. No, I cannot see where the water would hit coming out of there.

Q. You cannot tell anything about the hole from the appearance of that picture, is that right?

A. That is right, yes, sir.

Q. That is it doesn't look to you like the same place?

A. Not from where I was looking at it, no.

Q. With reference to Exhibit "F," does that look like the mouth of the trommel?

(Testimony of Frank Harris.)

A. It looks like the mouth of the trommel, exactly.

Q. Where would the hole be on that picture?

A. I just described that to you, Mr. Hellenthal—that this here picture is not taken in the proper way to tell.

Q. But that shows the place where the water would hit the ground, doesn't it?

A. I don't know whether it does or not. As I told you before, there is quite a distance here.

Q. The fellow that took that picture might have overlooked the hole—might have taken that picture very carefully so as not to show that hole?

A. If the man who took this picture had taken it up and down the hill it would be a better explanation than the way it is now—this shows the mouth of the trommel.

Q. And it doesn't show any hole. Look at Exhibit "G" and see if you can see anything there that makes you think you were ever [331] there before.

A. Yes, I see the door of the penstock.

Q. That looks natural, does it?

A. Yes, you bet it does.

Q. That is the only natural thing about that picture?

A. The trommel, of course, comes out, but I should say the thing had been changed—it wasn't in this direction.

Q. That doesn't look right, does it? A. No.

Q. And the place where that spout would throw

(Testimony of Frank Harris.)

the water on the ground doesn't show any hole?

A. You said there was a pile of rocks there.

Q. It shows there, don't it?

A. It might be bricks,—I cannot tell.

Q. That pile of rocks wasn't there when you were there on January 2d? A. No.

Q. That picture shows exactly where the water would come down, doesn't it?

A. On the 2d of January?

Q. No, where it would come down from that spout, whether that is the right one or the wrong one, I don't want to discuss that with you.

A. Why, yes.

Q. And where that picture shows that the water would come down from the spout, that hole doesn't show, does it?

A. No, you have a bunch of rocks there.

Q. And there is no trench leading from that bunch of rocks or from anything else, is there?

A. You cannot see it in this picture.

Q. How far down did you say that trench ran?

A. Oh, 20 or 30 feet.

Q. Come over to this map, Mr. Harris, and let us see where it would go on this map—can you point out on this map where [332] the hole was?

A. That is a pretty large map to point out a small hole, Mr. Hellenthal.

Q. You can get somewhere within a mile or two of it, can't you?

A. You want me to point to where I was standing or to where I was looking at this trench?

(Testimony of Frank Harris.)

Q. I want you to point to where the hole was.

A. I cannot give you the exact place—I can give it to you approximately.

Q. All right.

A. Right about here, somewhere.

Q. Where was the trench you saw?

A. It led down the hill.

Q. Did it lead along the course that is indicated there by that shading, the light shading?

A. This here, you mean?

Q. Yes.

A. Well, no—that shows, Mr. Hellenthal, as the other—that is perhaps connected up to the mouth of the trommel here—that shows the curve here, but what I have reference to there was no curve that I could see.

Q. No curve at all. This drawing, then, is all wrong?

A. I don't know whether it is all wrong or not.

Q. It doesn't follow your trench, is that right?

A. I don't know when that was made, Mr. Hellenthal.

Q. Of course you don't. I am not asking you whether you know when it was made—I am asking you whether this shows the thing correctly or not. Does that show the course of that trench you saw on the ground correctly—was the course of that trench along the same line that that shaded line is?

A. Would you allow me to explain?

Q. Sure.

A. The water coming out of this trommel, or what-

(Testimony of Frank Harris.)

ever might come out, would fall I should say 7 or 8 feet on a 45, which [333] would hit, I don't know just exactly how many feet from the mouth of the trommel out on the level, but any fair-minded man could judge that; and from there it cut a place right down to this place where there was grass—and there wasn't much, in fact—no timber or heavy stuff—it was perhaps grass—and from that you could trace it to where it had come out and took away the earth with it. Now, it didn't run in a zigzag this way.

Q. It ran straight? A. Well, practically so.

Q. For at least 20 feet? A. Yes, 20 feet.

Q. That is as far as you traced it, is it?

A. Yes.

Q. Did it run any farther than that, do you think—farther than 20 feet?

A. I couldn't say to that. I don't suppose anybody drank up the water at the end there, or anybody used it—it must have flowed over the ground.

Q. I am asking you what you saw—how far did you see that water?

A. Twenty or 30 feet, I told you.

Q. And for that entire 20 or 30 feet it was a straight trench 18 to 20 inches wide and 6 to 8 inches deep, isn't that it?

A. Practically straight, yes—practically straight.

Q. And it didn't follow the line that is indicated on this map, and curve like this map shows?

A. Not that I have any recollection of now.

Q. You know what you saw, don't you, Mr. Harris?

(Testimony of Frank Harris.)

A. Well, that map isn't exactly the way I am explaining it.

Mr. HELLENTHAL.—No; that will be all.

(Witness excused.) [334]

Testimony of Mrs. Anna Bach, for Plaintiff.

MRS. ANNA BACH, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Mrs. Anna Bach.

Q. Where do you live, Mrs. Bach?

A. Right here, next to Koski's house.

Q. Right next to where Koski's house was?

A. Yes.

Q. How long did you live there before the slide?

A. Since 1915.

Q. On the morning of the slide were you in the house? A. I was home, yes.

Q. What did you do, say an hour or two before the slide? A. I was cooking.

Q. Did you have occasion to look out of your window at any time?

A. Yes, I looked out of my windows.

Q. In the direction of the mountain-side?

A. Yes.

Q. What did you see there?

(Testimony of Mrs. Anna Bach.)

A. After nine I seen water coming down from that bank.

Q. You saw water coming down? A. Yes.

Q. Where was that water coming from?

A. From that bank where the slide broke loose.

Q. You saw the water—where was the water when you saw it? A. You mean where it came from?

Q. No, the first place that you saw it.

A. I saw it right by that bank where the slide broke loose, where that big stump is.

Q. I understand you to say you saw the water right in the place where the ground broke loose?
[325]

A. Yes.

Mr. HELLENTHAL.—That is leading.

Mr. RODEN.—I simply repeated what I felt sure she had said.

Q. Tell us again what you said about where you saw the water. A. Yes, I seen the water.

Q. Where did you see it? A. By that bank?

Q. By which bank?

A. Where the slide broke loose.

Q. Now, that was about what time in the morning? A. After nine.

Q. How much water did you see, about, there, Mrs. Bach?

A. In the beginning it wasn't so very big, but it was growing bigger and bigger all the time until eleven.

Q. Did you see the water several times between say 9 o'clock and the time of the slide?

(Testimony of Mrs. Anna Bach.)

A. Yes, I did.

Q. Did you see anybody out there on this ground above your house? A. On our lot.

Q. Not on your lot but above your house?

A. I saw Mr. Koski up working with the shovel below the tower.

Q. Where was Mr. Koski?

A. He was below the tower—he was working with a shovel to keep away that water what was coming down.

Q. He was working with a shovel?

A. Yes—there was another man on the lot, too.

Q. I wish you would point out your house on this. Will you please show to the Court and jury where your house is located—which one is your house?

A. That is our houses—here is our house—here is our kitchen, and the kitchen opens just on that hill—I could see everything so plain that morning.

Q. Point out where you saw the water.

A. Right here, by that stump there. [336]

Q. That stump is right back of the tower, is it?

A. Yes, right back of the tower—and I saw it there, too, same place; and after eleven there was two branches that came off of that big stream—it was coming down—it was on our lot.

Q. About where did the branch-off start, Mrs. Bach?

A. The branch came off to the tower, and there was one big stream coming down; after eleven it was going, one here, and one here—you can see our

(Testimony of Mrs. Anna Bach.)

chicken-house that is here located—there was another big stream coming down underneath the chicken-house on our lot.

Q. Now, right at the time of the slide, Mrs. Bach, where were you standing in your house?

A. I was standing right at the table by the windows—by my kitchen windows.

Q. Your kitchen was the back part of the house?

A. Yes.

Q. The back, towards the mountain-side?

A. Yes.

Q. How long before the slide was it that you saw Mr. Koski standing there?

A. Our girl, she told me, “There is Mr. Koski working on that water.”

Q. Your little daughter said that?

A. My daughter, yes—she told me and I looked up and I see him working—it was after eleven.

Q. At the time of the slide you were looking out of the window? A. Yes.

Q. What happened?

A. When I looked I looked through the window, and our girl was reading in that window next to me, and I looked and I seen Mr. Koski standing on our lot, a little bit sideways—he was standing like this, with his head to my window, and at the same moment my windows was all dark, covered with water and mud, and then I couldn’t see anything more, because it was [337] dark in our kitchen, and I and the girl were running away.

Q. Did the side of your house break in then?

(Testimony of Mrs. Anna Bach.)

A. Yes, it broke in.

Q. What made it break in?

A. Such big rocks came—about that size.

Q. Anything else?

A. Little stones and big rocks and everything came in, and dirt—our kitchen was covered with stones and rocks and water, and the kitchen stove was broken too; then I went away—I was afraid to stay because I was hit with mud, too, on the head, and then I went in again because I had nothing on and I was all dirty from the mud; and when I came in I seen a body laying on the floor—I couldn't explain what it was because it was covered with stones—big stones and rocks and dirt; after he moved his head I see it was his head, Mr. Koski's head, and he was laying like dead.

Mr. RODEN.—Wait—that is all, Mr. Hellenthal, you may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. What time in the morning did you first see the water? A. It was after nine.

Q. Pretty nearly 10 o'clock, wasn't it?

A. No, no, it was after nine.

Q. Nearer nine than it was ten?

A. It was after nine when I seen the first stream.

Q. How much after nine?

A. I don't remember that, but it was after nine.

Q. Wasn't it after ten?

A. No; it wasn't after ten—it was after nine.

(Testimony of Mrs. Anna Bach.)

Q. How much before ten?

A. I don't know that because I don't remember—I couldn't tell you the right answer, but it was after nine when I seen that. [338]

A. It wasn't before nine when you saw that?

A. No.

Q. It was between 9 and 10 o'clock?

A. Yes.

Q. Sometime between 9 and 10 o'clock?

A. Yes.

Q. You then saw the water for the first time?

A. Yes.

Q. You live right at the side of that hill, and you have a good view, you say, up that hill there?

A. Yes, I have a very good view from my kitchen windows.

Q. And the first water you saw running over the ground there was between 9 and 10 o'clock in the morning, Mrs. Bach? A. Yes.

Q. Now, at eleven o'clock you saw more water there, didn't you? A. Yes, it was a big stream.

Q. There wasn't so much water between 9 and 10 as there was at 11 o'clock.

A. No, there wasn't so much.

Q. There was quite a lot of water when you first saw it, wasn't there?

A. It was about this size when I first seen it, but after eleven it was awful big—it was all over the whole hill.

Q. At first there wasn't so much water, and then it got bigger? A. It got bigger all the time.

(Testimony of Mrs. Anna Bach.)

Q. And about 11 o'clock it got to be a big stream?

A. Yes.

Q. There was water running everywhere just before 11 o'clock—before the slide?

A. There was two branches which broke into our lot.

Q. Before that it didn't run into your lot?

A. No.

Q. It didn't run into your lot until about 11 o'clock? A. Yes. [339]

Q. And it branched off so that you could see two branches running in your lot? A. Yes.

Q. The reason you know there were two branches is because one was on your lot and the other one was on Koski's lot?

A. Those two branches that I seen was one on our lot—one was underneath the chicken-house and one was before the chicken-house.

Q. There were two streams on your lot?

A. Yes.

Q. There was a stream on Koski's lot, too, wasn't there? A. Yes.

Q. There were a lot of little streams all over that hill?

A. There was water all over because it came from where that flume came from.

Q. You think it came from that flume?

A. I am sure it didn't come from higher up because I looked up and I saw water come from where that flume was.

(Testimony of Mrs. Anna Bach.)

Q. You could see the flume from where your house was?

A. I couldn't see the flume, but I saw men working on the flume.

Q. You could imagine where it was coming from? A. Yes.

Q. You couldn't see it?

A. I could see men working from my chicken-house after the houses was down—it wasn't before—it was after.

Q. Now, Mrs. Bach, isn't it a fact that when the slide happened there were two slides—a piece broke off first right by Koski's house, and then there was some more broke off after?

A. The second slide, when that broke off I was standing on the outside by the chicken-house.

Q. There was a piece broke off at Koski's house first, and then right after came the whole business; isn't that right?

A. I didn't stand there and watch the whole business—if I stand and watch that slide I would have been killed, because [340] it came so quick.

Q. Isn't that the way it happened?

A. I don't know because I didn't see that when the house went down.

Q. No, you didn't see it when the houses went down, but before the houses went down, the first thing, there was a bank that broke off right behind Koski's house—what I mean, a little ways up—first that went down, and then the other came right after it—isn't that the way it happened?

(Testimony of Mrs. Anna Bach.)

A. I didn't see that—my clothes were covered with dirt and mud.

Q. Do you know Mr. Tom McDonald, a big fellow? A. Yes, I know him.

Q. He talked to you about this once, didn't he?

A. He asked me if the water came down.

Q. Didn't you tell Tom McDonald this—he was at your house, wasn't he?

A. No, he was on the outside—he talked with my husband—he wasn't in the house.

Q. There were a lot of large rocks running against the house that Koski was taking care of too, wasn't there?

A. We had lots of rocks, too, on our lot.

Q. I mean before the slide Koski had to take care of a lot of rocks behind the house?

A. Behind our house?

Q. No, behind Koski's house.

A. There was no rocks before the slide on our lot.

Q. Not on your lot, but on Koski's lot, I mean.

A. I don't know that, if he have rocks there.

Q. Didn't you see the rocks coming down that bank right behind the Koski house just before the slide?

A. No, I didn't see that—it was dark in my kitchen.

Q. Didn't you, at the time you were talking to Mr. McDonald, tell him in substance as follows: That two slides occurred—

(Testimony of Mrs. Anna Bach.)

A. No, no; I didn't say that, because I didn't see it. [341]

Q. Wait—let me give you the whole question, then you will probably remember it. Didn't you tell Mr. McDonald about what I am saying now—not word for word—I don't mean that, but I mean in substance—that two slides occurred; the first was the high bank close to Koski's house; the second slide followed immediately afterwards and extended up the hillside to the present top or apex—did you tell him something like that?

A. No, no, I couldn't tell him that because I didn't see that.

Q. You never said that to Mr. McDonald?

A. No; he only asked me when the water came down, before the slide or after, and I told him after—he start at what I told him and he didn't ask me any more.

Q. You didn't tell him what I have read to you, or anything like that? A. No.

Q. Nothing about two slides at all?

A. He was talking to Mr. Morgan—I don't know what he told him, but he didn't talk to me.

Q. You didn't say anything about two slides?

A. How can I tell him if I don't see it—I didn't see two slides—I see just one little piece come down.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RODEN.)

Q. You say that you saw some men at work up

(Testimony of Mrs. Anna Bach.)

there on the flume? A. That was after; yes,

Q. About how long after?

A. Twenty-five minutes, then the water stopped. I think they shut it off because I see those men—they were hammering on that flume.

Q. They were hammering up there? A. Yes.

Mr. RODEN.—That is all.

(Witness excused.) [342]

Testimony of C. J. Skuse, for Plaintiff.

C. J. SKUSE, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name, Mr. Skuse?

A. C. J. Skuse.

Q. What is your business?

A. Well, I haven't got any now. I used to be a farmer.

Q. How long have you been around the town of Juneau, Mr. Skuse? A. Off and on, 25 years.

Q. Were you in the town of Juneau on the 2d day of January, 1920? A. Yes, sir.

Q. That is the day on which the slide occurred?

A. Yes, sir.

Q. Where were you at the time of the slide?

A. I was in George Burford's store.

Q. Whereabouts were you in George Burford's store?

(Testimony of C. J. Skuse.)

A. Right inside of the door, about the center of the showcase—the front showcase.

Q. Did you have occasion to look through the window at any time?

A. Yes; I was looking out the window—looking out the window up the hill some few minutes before the slide happened.

Q. In what direction were you looking?

A. I guess it is southeast, isn't it, from Burford's store, up the side hill there?

Q. What object were you looking towards—what thing were you looking at?

A. I was looking at a stream of water running down the ridge there.

Q. Where was that stream of water running, Mr. Skuse? A. Right about the center of the ridge.

Q. The center of what ridge?

A. The ridge that broke away. [343]

Q. Now, how long before the slide did you say it was that you saw that?

A. Oh, a few minutes—four or five minutes—I couldn't tell exactly.

Q. Then what did you do?

A. Well, then the slide took place I went out and went out towards—down the street.

Q. Did you see any water running down there then?

A. After I got down there, yes; there was some water running, but not in the same place.

Q. Now, then, state again where this water that you saw through the window was running—where

(Testimony of C. J. Skuse.)

was that water running with reference to the ground that broke loose afterwards, about?

A. Right straight in the center of it, about.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That was after you got down to the slide, Mr. Skuse? A. Yes.

Q. You couldn't see that from Burford's?

A. Yes, I seen it from Burford's.

Q. You saw the water farther up from Burford's, but you saw it running over the middle of the slide after you got to the slide?

A. Yes, it was running in the same place where I seen it first—yes, the same place.

Q. The water you saw from Burford's you saw pretty far up the hill, running along the middle of the hog-back—is that right?

A. I couldn't see very far up the hill—only a little ways above where the ground broke—from where I stood.

Q. It was a little ways above where the ground broke that you saw the water? A. Yes.

Q. Maybe 25 feet above that?

A. I couldn't tell how far. [344]

Q. It was a little ways, anyhow, 15 or 20 or 25 feet?

A. Maybe that right up—there is brush growing and you couldn't see where the water came from.

Q. And when you got down to the slide a little

(Testimony of C. J. Skuse.)

while afterwards—that was just before the slide, wasn't it? A. Yes.

Q. And when you got down to the slide some little bit afterwards you saw the water coming down over the slide?

A. Yes; it didn't last very long, but it was in the same place where I seen it up to Burford's.

Q. It lasted how many minutes would you think?

A. I couldn't tell—15 or 20 minutes—15 minutes.

Q. There was quite a stream, wasn't there, Mr. Skuse?

A. It was quite a stream when I first saw it.

Q. It was a stream of clear bright water that you could easily see?

A. I don't know about it being very bright—I couldn't tell from that distance.

Q. You could see it well, I mean?

A. Oh, yes; yes, I could see it well.

Q. It wasn't something you had to look through a spy-glass to see—you could see it with your naked eye at Burford's?

A. No—I could see it plain.

Q. It was plainly to be seen? A. Yes.

Q. And it was wide enough and clear enough and bright enough so you could see it? A. Yes, sir.

Q. How old are you, Mr. Skuse? A. I am 63.

Q. Your sight is good for your age, isn't it?

A. It is good—it is good yet.

Q. It is good for your age? A. Yes.

Q. And you could clearly see that stream from Burford's corner? [345]

(Testimony of C. J. Skuse.)

A. Yes, sir; I could see it,—I could see it from here.

Q. It was so plain you could clearly see it from the courthouse? A. Yes, sir.

Q. The stream over the middle of the slide, Mr. Skuse, that was a big stream, too, wasn't it, that ran over the top of the slide?

A. After the slide happened?

Q. Yes.

A. It didn't seem to me to be as large as it was when the slide happened.

Q. It didn't seem to be as large? A. No.

Q. But it was a big stream, however?

A. It took me some time to go down there, you know—I was crippled at the time.

Q. And you didn't get down there as quickly as—

A. I didn't get down there as quick as I could now.

Q. And after you got there at last, there was a stream coming over the top of the slide? A. Yes.

Q. And that was a pretty good-sized stream, too, wasn't it?

A. It wasn't a very big stream, but at that time I noticed when I got down there the water was muddy that was coming over the slide.

Q. That is the water in the slide? A. Yes.

Q. But the water on top wasn't muddy before it struck the mud, was it? A. I didn't notice that.

Q. What do you mean by running over the slide—you mean where the stuff had slid down, Mr. Skuse

(Testimony of C. A. Gabie.)

—over the muck? A. Yes, over the muck.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [346]

Testimony of C. A. Gabie, for Plaintiff.

C. A. GABIE, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Mr. Gabie, you may state your name.

A. C. A. Gabie.

Q. Where do you reside? A. Juneau.

Q. How long have you been residing in the town of Juneau?

A. Somewheres around 6 or 7 years this last time.

Q. Were you in the town of Juneau the 2d day of January, 1920? A. I was.

Q. Do you remember the occasion of the slide?

A. Yes, sir.

Q. Where were you at that time?

A. I was in Dave Housel's place, in the Brunswick.

Q. How was your attention attracted to the slide?

A. By a noise.

Q. Did you know what caused the noise?

A. Well, there was an awful noise—sounded like 40 wagons running up and down the street on loose planking.

Q. What did you do then?

(Testimony of C. A. Gabie.)

A. I got out of the front door.

Q. What did you do then?

A. Went out of the front door, and I see some flashes up on the hill.

Q. Then what did you do?

A. I run down the street.

Q. Where to?

A. Right this side of the soda works.

Q. What did you see there?

A. I see the street cave in a few minutes after I got there, see [347] the dirt up on the hill break loose, come down and hit the buildings, and the street come in.

Q. When you speak about the street you mean Gastineau Avenue up there? A. Yes, sir.

Q. It is a bridge? A. Trestle work there.

Q. Trestle work, yes. Did you see any water anywhere? A. Yes, sir.

Q. Where did you see any water?

A. There was water all over up there.

Q. How high up on the mountain-side did you see any water, with reference to the ground that had broken loose?

A. Right where it come over the top of the hog-back, is the first water I noticed.

Q. And did this water continue down through the slide mass? A. Yes, sir.

Q. Were you there before the fire department reached there, Mr. Gabie?

A. Why, I was there quite a few minutes before the alarm was turned in.

(Testimony of C. A. Gabie.)

Q. Do you know who turned in the alarm?

A. I do not.

Q. Did you see it turned in?

A. No, I didn't. I went into Mr. Goldstein's store at that time and went through the back door.

Q. What did you see in Goldstein's store at that time?

A. When I went into Goldstein's store there was another man came there, and the both of us went through the back end, and the water hit us when we went through the back door—we had to force the back door, and the water hit us.

Q. Then you went up on the slide area?

A. We went upon the slide—we see a man or woman—I didn't know whether it was a man or woman, who was in their underclothes, [348] and we couldn't get across the muck—it was about 2 feet deep up there, so I came down through Goldstein's store and went around by the Windsor apartments and came around that way.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Your name is Gabie? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of P. R. Bradley, for Plaintiff.

P. R. BRADLEY, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. I just want to ask you a question or two. You are familiar with the pipe-line that leads from the penstock down to the mill?

A. In a general way; yes.

Q. Can you tell us whether or not there is a valve in that pipe-line anywhere? A. There is.

Q. Whereabouts is that located?

A. You are speaking now of the time, January 2d, 1920?

Q. Yes, sir.

A. There was a large valve at the mill where the pipe-line of the fresh-water system joins the pipe-line of the salt-water system. Now, I am not so familiar with the valve connections between the 30-inch pipe-line and the 8-inch wood stave pipe-line of the city's high-pressure system—I do not think there [349] was any valve at that point in our main line, although there may have been.

Q. But you do know that you had at least one valve in your main line?

A. We had one valve in our main line which was chained and padlocked.

Q. And what is the distance, about, Mr. Bradley,

(Testimony of P. R. Bradley.)

from the penstock to where this valve was located on the pipe-line, on the 2d day of January, 1920—oh, approximately? A. About 2,732 feet.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That valve, Mr. Bradley, was that ever shut except on occasions when you had to make repairs, or something of that kind?

A. The valve was put in at that point in order to be able to shut the salt-water system away from the pipe-line on this side, and in order to be able to repair this pipe-line without shutting down our entire mill, and it never was disturbed—there was no reason why it should have been disturbed unless there was a breakdown this side of the mill; and in order that there should be no disturbance we took every precaution we could think of to keep it from being disturbed, and we put a chain and a padlock on it, and the key to the padlock was in the possession of the mill foreman—the key was given to him and kept in his care.

Q. The valve was locked with a chain and padlock so no one could close it, and the key was placed in the possession of Mr. Clauson, the mill superintendent; is that right? A. That is right.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) But the fact remains nevertheless that that valve was used to shut off the water in this main pipe-line?

(Testimony of H. B. Lefevre.)

A. In case such a condition were necessary.

Mr. RODEN.—That is all.

(Witness excused.) [350]

Testimony of H. B. Le Fevre, for Plaintiff.

H. B. LE FEVRE, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Please state your name. A. H. B. Le Fevre.

Q. What official position do you occupy?

A. United States Commissioner.

Q. For the Juneau Precinct?

A. Juneau precinct.

Q. Were you in the city of Juneau on the 2d day of January, 1920? A. Yes.

Q. That is the time at which the slide occurred?

A. Yes.

Q. Where were you at the time of the slide?

A. I was in my office.

Q. Where was your office located?

A. Right opposite the slide—directly opposite.

Q. What, if anything, attracted your attention to the slide?

A. Well, I heard a roaring noise, and I was sitting close to the window and looked out.

Q. And when you looked out what did you see?

A. Well, I saw a house coming down, striking

(Testimony of H. B. Le Fevre.)

the roadway—the trestle roadway and tearing it out, and I saw the whole hill coming gradually down towards the street, and it stopped at the houses—I saw all that occurred there.

Q. Did you see any water anywhere? A. Yes.

Q. Where?

A. Well, right opposite where the slide came from there is—it slopes down on one side to a canyon that, I assume, has been partially filled up, but at any rate I could see no [351] water on that side; but on the other side, on the north side of a divide between a large canyon and a little gully, I could see water coming down the little gully.

Q. Where was this little gully with reference to the slide area?

A. Why, the gully I should imagine would be in about the center of the whole slide area, and it would be to one side of where the slide started.

Q. Who was in your office at that time, Judge?

A. A little girl that was working for me—a little Indian girl, Marie Orsen, and John B. Marshall, an attorney.

Q. That is John B. Marshall, the attorney?

A. Yes.

Mr. RODEN.—You may cross-examine.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. The water you saw, Judge, was in the gulch right on one side of the place where the slide broke loose—that is right, isn't it?

(Testimony of H. B. Le Fevre.)

A. That, Mr. Hellenthal, is where it came from; then it swerved into the slide and boiled up.

Q. The gulch ran right in to the slide a little below where the slide came from—that is right, isn't it?

A. Yes; this water was at the northern side of the divide between a canyon where, of course, there must have been water but you couldn't see it—it was too far away—and of the gully that came down and probably would strike the center of the slide area, but it was to one side of where the point of this divide had broken off—that is what seemed to have started the slide, was the breaking off of that,—it was to one side of that.

Q. You didn't see any water coming over where the slide broke loose?

A. Not over the apex of that divide; no. [352]

Q. You saw no water running there?

A. None.

Q. But where you saw the water was on the gulch side of that, in a little gully that ran down there?

A. Exactly.

Q. And that would be the side towards the town?

A. That *would be* the side towards the town.

Q. At the point where that gully would strike the slide? A. Yes.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) Did you see any water boiling around in there anywhere?

A. The water seemed to come down that gully and swerve, and of course as it came down the water

(Testimony of H. B. Le Fevre.)

would back up,—you know, it would go by jerks, the water would; as the earth was pushed down, and would form a little crest, the water would run behind it, then it would burst and boil, and then come down, but of course that water—that slide would come down and that filling up with water, you know, was of very short duration because the whole thing seemed to come right down—didn't seem to come very fast, but to come right down, all of it.

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock tomorrow morning.) [353]

MORNING SESSION.

March 26, 1921, 10 A. M.

Testimony of Georgia Higgins, for Plaintiff.

GEORGIA HIGGINS, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. Georgia Higgins.

Q. How old are you, Georgia? A. Fourteen.

Q. Where do you live?

A. I live down on 12th Street, right opposite the radio station.

Q. How long have you lived in Juneau?

(Testimony of Georgia Higgins.)

A. Three years.

Q. Do you remember the time when the slide occurred on the hillside? A. Yes, sir.

Q. Do you remember about how long ago that is?

A. Well, I should judge about a year.

Q. Where were you at the time of the slide?

A. Just this side of the schoolhouse.

Q. That is the schoolhouse in the town of Juneau?

A. Yes, sir; Juneau public.

Q. Did you see the slide? A. Yes, sir.

Q. I wish you would tell the Judge and the jury here what you saw.

A. I was standing talking to a girl friend of mine, and we were having a discussion about something around the Koski house, and she said, "Oh, look at the water," and just as I turned around I seen the water and then a lot of dirt, and then the house coming down.

Mr. RODEN.—You may cross-examine.

Mr. HELLENTHAL.—No questions.

(Witness excused.) [354]

Testimony of L. S. Robe, for Plaintiff.

L. S. ROBE, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Will you state your name? A. L. S. Robe.

Q. What is your business or profession?

(Testimony of L. S. Robe.)

A. Mining engineer.

Q. How long have you followed the profession of mining engineer, Mr. Robe?

A. About 23 years.

Q. I wish you would state to the Court and jury your qualifications—that is, your training, studies, etc.

A. I have had general engineering practice since 1886; the eleven years succeeding 1886 railroad work.

Q. What was the nature of the railroad work you performed? A. Construction.

Q. Construction of what?

A. Construction of railroad lines.

Q. In the course of your operations of that nature did you have occasion to study and come in contact with problems concerning hydraulics— water questions and water propositions to be handled?

A. Not hydraulics as technically applied, but I have had considerable experience in diversion— river and creek diversion, in connection with railroad construction.

Q. After you followed this line of railroad construction what was your line of employment?

A. I came north in '98, and was employed by the Treadgold people, in running the first lines for the Treadgold Alaska system in Klondyke for their large hydraulic works.

Q. That is in the Yukon territory, Mr. Robe?

A. In the Yukon territory, yes, sir. [355]

Q. What position did you occupy for a number

(Testimony of L. S. Robe.)

of years in the Yukon territory?

A. From 1900 to 1906 I was engineer and superintendent of mines of the North American Transportation and Trading Company.

Q. What was the extent of their mining operations over which you were superintendent?

A. They had about 80 properties, 12 or 14 of which were actively worked.

Q. How were those properties being operated?

A. Either hydraulically,—well, you might say they were all placer.

Q. How were these placer claims operated—by what method? A. Hydraulic, mostly.

Q. During that period of time did you have any experience in handling water, construction of ditches and flumes, installation of pipe-lines, and things like that? A. Yes, sir, considerable.

Q. I wish you would state briefly what your experience was along that line.

A. We built something like 50 miles aggregate of ditch and pipe-line, and probably surveyed out a matter of a hundred miles or so of proposed pipe and ditch line.

Q. And these pipe and ditch lines that you have spoken about were installed under your personal supervision? A. They were.

Q. In the course of your experience, Mr. Robe, have you had occasion to study the action of water on certain kinds of materials and different kinds of materials? A. Yes, sir.

(Testimony of L. S. Robe.)

Q. Has it also come within the purview of your profession to study geology?

A. To a certain extent, yes.

Q. State briefly what studies you have gone through on the subject of geology.

A. I have LaCont, Chamberlain and Salisbury. The latter, I [356] think, is the latest work on that subject. I do not claim to be a geologist, however.

Q. You do not pose here as a geologist?

A. No.

Q. You have a certain amount of knowledge concerning geology and geological subjects?

A. Yes, sir.

Q. Have you also had experience in geological matters,—I mean have you had occasional opportunity to study such matters?

A. Yes, there is a certain amount of geology required in reporting on properties in mining.

Q. You say you were in Dawson in 1906?

A. Yes, sir.

Q. Then you went to Fairbanks?

A. I was in business myself for a number of years in Fairbanks and Iditarod, running mines, reporting on properties, doing considerable survey work.

Q. Did you do any ditch construction in the Fairbanks or Hot Springs district? A. I did.

Q. To what extent?

A. I laid out one ditch system about 30 miles. That was never constructed, however, or has not been up to the present.

(Testimony of L. S. Robe.)

Q. Did you ever have anything to do with laying out a ditch?

A. I laid out a ditch on Ester Creek about 5 and a half miles in length; and numerous other ditch lines.

Q. What was the nature of the country through which these ditch lines were built?

A. Composite soil generally.

Q. Where with reference to the topography were the ditches run—were they on level ground?

A. Generally on sidehills—sloping ground.

Q. Are you acquainted with the area, Mr. Robe, which is covered by the slide which occurred here in Juneau on the 2d day of January 1920? [357]

A. I have been on the ground; yes, sir.

Q. Have you examined the ground there?

A. I have.

Q. I wish you would state to the Court and jury what you found.

A. I found a slide that had occurred probably a number of months ago, just how long I do not know. The toe of the slide was quite flat and puddled—evidently a large admixture of water with the material in that slide.

Q. What is the composition of the material which you found in the neighborhood of the slide and in the slide area?

A. Largely loam and loose rock, with probably 20 per cent of clay material overlying the bedrock.

Q. What is the character of this ground or ma-

(Testimony of L. S. Robe.)

terial with reference to the absorption of water?

A. Fairly porous.

Q. Is it such material as will retain water?

A. It would, yes; there is sufficient clay, in my judgment, to retain considerable water.

Q. What is the bedrock formation in that neighborhood? A. Schist.

Q. Have you had any experience with penstocks, Mr. Robe? A. I have.

Q. I wish you would state, in a general way, the purposes and objects of a penstock?

Mr. HELLENTHAL.—I think, your Honor, that is immaterial, what the purpose and object of a penstock in general use is, because the conditions here are so very different from what they are in most places.

The COURT.—I suppose it is preliminary.

Mr. HELLENTHAL.—I guess probably it is, all right.

The COURT.—Proceed.

Q. You may go ahead, Mr. Robe.

A. A penstock is an impound or settling tank to place the water at rest preparatory to its introduction into the service or duty pipe. [358]

Q. What is the primary object, if you wish to call it so, of a penstock with reference to the collection of water? A. The final object?

Q. The primary object.

A. The primary object is a settling tank to eliminate any sticks, brush, stones or sand from getting

(Testimony of L. S. Robe.)

into the service pipe; also to prevent the introduction of air into such pipe.

Q. Are penstocks generally provided with an arrangement or an appliance to carry off any water that might not be taken up by the service pipe leading from it?

A. Good engineering requires waste ways of sufficient size to carry all possible flow irrespective of duty or service pipe.

Q. You have practically heard all the testimony in this case, Mr. Robe? A. I have.

Q. And you have heard the evidence to the effect that water flowed from this penstock that was located on the sidehill through a spout that has been described, this water discharging upon the ground and running down the hill? A. Yes, sir.

Q. I wish you would state whether or not there was any ready, expedient and practical way of preventing this water escaping from this penstock through the spout from doing any possible damage to the territory over which it flowed?

A. The natural drainage there would permit of a short flume or pipe, or both, that would adequately carry all drainage from such reservoir or penstock to a point of safety.

Q. Would it be very much of an engineering feat to install such a pipe or flume?

A. It would not.

Q. Most any kind of a box would have done for that, wouldn't it? A. A box or a pipe.

(Testimony of L. S. Robe.)

Q. Now, from the examination which you have made of the slide area, Mr. Robe, and from what you have heard might the slide [359] be caused by water?

Mr. HELLENTHAL.—Might be caused by water?

Mr. RODEN.—Was it caused by water?

A. There is no doubt in my mind but what water under pressure caused that slide.

Q. Now, if ground located as this ground was on the sidehill, and ground of the character that you have described, if that became saturated with water from any cause whatsoever—we will say from snow water or rain water—what takes place in this ground, if anything, in the mass?

A. The first water generally acts as a puddle and impacts the ground up to a certain point, after which time the water comes in excess and produces a thinning out of the soil or other material, and after there is sufficient pressure something has got to give way.

Q. Now, if a sufficient quantity of water were added to this soil to a point where the soil becomes saturated, or supersaturated, it would naturally cause the soil to move, would it not?

A. Absolutely.

Q. In other words, to use a technical expression, the material would attempt to find a lower level of repose? A. Yes, sir.

Q. Or flatter angle, as we have called it?

A. Yes, sir.

Mr. RODEN.—That is all.

(Testimony of L. S. Robe.)

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr.—did you say your name was Rogue?

A. Robe.

Q. Mr. Robe, you examined this material in the slide mass, I believe you said?

A. I have, yes, sir.

Q. And you found that to be about a third clay?
[360]

A. I should think, roughly about 20 per cent.

Q. Then you found probably about half of it would be rock, would it not?

A. No, I hardly think it.

Q. What per cent of it would be rock, large and small?

A. I would say around 20 per cent clay, and possibly 50 per cent soil and other material, and the balance rock.

Q. Now, that examination you made was the result of an analysis you made on the ground?

A. By analysis you mean a careful weighing by the cubic yard, etc.?

Q. Yes. A. No.

Q. You made no such analysis? A. No.

Q. You simply examined it with the naked eye as well as you could without any instruments or tests that might be applied?

A. Exactly; one's general experience generally gives a better result that way than a chemical analysis of the cubic yard.

(Testimony of L. S. Robe.)

Q. If you take a mass and squeeze it in your hand like this it would form a bulb like putty, would it not? A. It would in some places, yes.

Q. And that is because of the clay content?

A. Soil will do the same, Mr. Hellenthal, if there is an admixture of water.

Q. Not quite to the extent that clay will?

A. Not with quite the tenacity; no, sir.

Q. Clay is the stuff that makes it stick?

A. Yes.

Q. If it were sand it would fall apart, wouldn't it? A. Yes.

Q. That is true, isn't it? A. Yes.

Q. Now, did you look at the place the slide came from—the upper end of it? [361]

A. I was from the upper end over the slide only—no other portion of the slide.

Q. You saw that spring there, did you, Mr. Robe?

A. I did not, Mr. Hellenthal.

Q. You did not look for that—your examination was confined to the character of the soil?

A. The character of the soil and the water.

Q. You didn't find any spring at all?

A. I did not.

Q. Did you look for one?

A. I would have noticed it if I had seen one, I think.

Q. Would you have noticed it if there had been one there? A. I think so.

Q. You think your examination of the soil con-

(Testimony of L. S. Robe.)

ditions was not any more careful than your examination of the water conditions, Mr. Robe.

A. No, I think the examination was fair and thorough.

Q. Were you up at the upper end of the slide?

A. At the extreme upper end of the slide.

Q. And you saw no water coming from the ground there—from a spring?

A. No water, only moisture there for a space $3\frac{1}{2}$ or 4 feet wide.

Q. There was moisture coming from the bed-rock? A. I saw moisture but no running water.

Q. No running water at the time you were there. All right. Now, the rock material in the mass consisted of such broken rock as would come from the side of the mountain—is that true?

A. Exactly.

Q. Some small pieces, some quite large.

A. Yes, sir.

Q. And angular in character? A. Yes.

Q. You have been building a great many ditches, I believe you said, Mr. Robe? [362]

A. We built a good many, yes, sir.

Q. You built a ditch how long, in Dawson, did you say? A. One about twenty-odd miles.

Q. That is a pretty long ditch, isn't it?

A. A long ditch system, yes, sir.

Q. That was along the mountain-side?

A. Along the mountain-side, and some of it quite steep.

(Testimony of L. S. Robe.)

Q. And the ditch was built in the ground, was it, Mr. Robe?

A. It was built in the ground and loose rock.

Q. The ground there on the mountain-side is similar to the ground here, is it not?

A. In many respects, yes.

Q. It has about the same clay content and the same rock content and the same soil content?

A. With 20 miles of ditch you would get a varied character of ground,—some of it was very close.

Q. It wouldn't all be just the same?

A. No, not all the same.

Q. But the same general character?

A. The same general character.

Q. Of course the soil in Dawson would not be exactly the character of the soil here, depending somewhat upon the character of the bedrock, wouldn't it? A. Exactly.

Q. But the general character of the soil lying upon the slope in Dawson would be about the same as it is here? A. Pretty much.

Q. What was the quantity of water carried in this ditch? A. Five hundred miner's inches.

Q. That would be about how many cubic-feet per second?

A. That would be about 12 second-feet—in the neighborhood of that.

Q. You used no flume in constructing this ditch—it was all built in the soil?

A. We had considerable flume. [363]

(Testimony of L. S. Robe.)

Q. Where the mountain was very steep, I presume?

A. No, not that, but crossing ravines and alongside of water courses.

Q. It was where you had to cross gulches?

A. Yes, where we had to cross.

Q. You have had some experience, then, in the construction of flumes? A. Yes, considerable.

Q. Wherever the ditch came to where you had to cross a gulch of course the ditch had to be put in a flume to get across on the other side?

A. Exactly, and the approaches as well.

Q. You built ditches in Fairbanks, I believe you said, Mr. Robe? A. Yes, sir.

Q. About how long were these?

A. The ditch on Ester Creek was about $5\frac{1}{2}$ miles long.

Q. Was that also built in the ground, or did you use a flume, or both?

A. There was a flume across Ester Creek, and from there probably 1200 or 1400 feet—otherwise in the ground.

Q. And the balance was in the ground?

A. Yes, sir.

Q. And that was about the same character of hillside that we have here and you had in Dawson?

A. A little more clay, I think, Mr. Hellenthal.

Q. There was a little more clay than there would be in Juneau or Dawson? A. Yes, sir.

Q. And aside from that it would be about the same general character, you think?

(Testimony of L. S. Robe.)

A. Yes, sir.

Q. And that ditch also was built along the hillside?

A. Along the hillside, but flatter ground, however.

Q. That was a little flatter than the Dawson ditch? A. Yes. [364]

Q. What was the capacity of that ditch?

A. I don't recall now,—in the neighborhood of probably 200 miner'ss inches, or 4 sluice-heads—that would be somewhere around 5 second-feet.

Q. That was a somewhat smaller ditch?

A. Yes.

Q. In the neighborhood of what second-feet would that be?

A. In the neighborhood of 5 second-feet, I think.

Q. Then you built some ditches in Fairbanks?

A. I laid out a number of small ditch lines, and also a 30-mile system for Frank Manley.

Q. That was quite a large ditch, was it, Mr. Robe?

A. That was about 500-inch capacity—it wasn't built.

Q. It wasn't finished? A. Only laid out.

Q. That was laid out on a hillside, too, was it?

A. Yes, quite a steep hillside.

Q. And as you laid it out it was to be about the same as the Dawson ditch was?

A. Yes, pretty much.

Q. And built under exactly the same conditions except the hillside was perhaps a little steeper?

A. A little steeper, and a little more loose rock.

Q. But that ditch has not been completed?

(Testimony of L. S. Robe.)

A. They have built portions of it, I believe, but it has not been entirely completed.

Q. Now, in connection with your work of course you had to build penstocks to get the water from the ditches into the pipes? A. Yes, sir.

Q. That is the only way you can get the water from a ditch or flume into a pipe, isn't it?

A. It isn't the only way—it is the only proper way.

Q. The only practical way. There might be other ways, but that is the way that everybody uses.

A. Yes. [365]

Q. Now, in building a penstock, and where you have built your penstocks generally, you would have sort of a settling vat in the bottoms to take care of the rocks and large boulders, is that right?

A. There is generally an apron provided,—good engineering practice requires a screen or trommel in the flume just prior to its entry.

Q. To take the leaves out?

A. To take the leaves or any other foreign matter other than sand. Sand is taken care of by a sluice incline inside of the tank.

Q. Now, if in this case a sand-box were installed some distance above the penstock to take care of that, there would be no necessity of employing the penstock for that purpose, would there?

A. If it was a short distance there would be no necessity.

Q. Then your answer in that regard is based upon the proposition that no settling-box exists a

(Testimony of L. S. Robe.)

short distance above the penstock, and if such a box did exist of course the penstock would not have to serve that purpose—that is true, isn't it?

A. Yes.

Q. Now, where you use the water for power purposes, whether it is to force water through a nozzle in connection with hydraulic works or to force it through a nozzle in a power plant, you would have to steady the flow of water in the penstock, wouldn't you?

A. It is considered good practice, yes, sir.

Q. But where the penstock is used as a mere funnel to get the water into the pipe from the flume, and the service pipe connects it with another tank lower down, which is a large tank supplied with an overflow, and that service pipe is kept 100 per cent open and is larger than the flume leading into the penstock, that would create a different condition, wouldn't it?

A. In that case that would not be a penstock then, Mr. Hellenthal. [366]

Q. In that case it would simply be a connection between the flume and pipe, isn't that true?

A. It would not be a penstock.

Q. It would not be a penstock in the technical sense of the word? A. Nor an impound.

Q. It would simply be a funnel to get the water from one device into another?

A. It would be a portion of your carrying system.

Q. It would be a portion of the carrying system, exactly. In that case, where the service pipe, as I

(Testimony of L. S. Robe.)

have described, is larger than the flume emptying into the funnel, or whatever it is—we refer to it here as a penstock although, as you say, it is not technically a penstock—there would be no occasion for any overflow at that penstock, would there?

A. If that was required as a settling tank or a reservoir, just as I stated in my evidence before, there should be sufficient waste way irrespective of the large pipe.

Q. But where the penstock is not used as a reservoir or a settling tank but merely constitutes a device to get the water out of the flume into the pipe, and the pipe is a greater carrying capacity than the flume that empties into it, there would be no occasion for any overflow or spillway at the penstock, would there?

A. You will pardon me, Mr. Hellenthal—

Q. Answer my question.

A. I cannot answer it because it seems to me that is a reservoir there, an impound, and if it is an impound, or something to collect water, there should be a waste way.

Q. Exactly,—you and I agree upon that, but where it is neither a reservoir nor an impound, but is a mere carrying device to carry the water, that is a different proposition, isn't it?

A. There is another point enters into it, that if I might be permitted—

Q. Answer my question.

A. I don't think I could answer it unless we insert an additional [367] point, and that is if it

(Testimony of L. S. Robe.)

is a temporary impound there should be sufficient grade given to it to take care of any possible excess water at any time.

Q. Yes, we agree on that, but if the service pipe is larger than the flume there is no chance of any water being impounded there, is there?

A. There is a possibility, yes. The evidence, I think, showed there was 2,700 feet of pipe line with a valve at the end.

Q. If the valve was closed the water would be impounded? A. There is the word "if."

Q. But if that valve is open, 100 per cent open, with a padlock on it so it cannot be closed, then would there be any chance for an overflow?

A. I think so, absolutely,—but if you have got a free flow there—if that 30-inch pipe is intended for a waste way, why have a valve on the end of it?

Q. Now, Mr. Robe, if you were putting that in there and intending it as a free flow,—putting it in there as an engineer—don't you know that sometimes you would have to repair things, and that it is a safe engineering proposition to put at least one valve in every pipe?

A. Always, Mr. Hellenthal.

Q. Always, certainly.

A. But we know the natural law of disaster. It is generally those times when we have those valves closed that trouble comes elsewhere.

Q. But if you have a valve that has never been closed and cannot be closed because it is locked,

(Testimony of L. S. Robe.)

unless the superintendent stands there and sees to it, that creates a different condition, doesn't it?

A. I fail to see it.

Q. You fail to see it, all right,—all your testimony, then, Mr. Robe, is based on that proposition. Now, look at this drawing I have got here, which is probably not as elegant as you could make, but I think it will serve the purpose. We [368] will assume now that this is the flume, where I am pointing, leading into this, which we will call the penstock, although as you suggested technically speaking it is a part of the carrying system and is not a penstock, but I am merely calling it a penstock for the purpose of this interrogation,—here is a service pipe leading from this penstock, and this service pipe will carry twice as much water as this flume can carry in,—you understand me?

A. Yes, sir.

Q. Now, I want you to explain to that jury what sense there would be in putting an overflow there so that the waste water could get away, if there is any sense in it, under the conditions, now, that I have named, and not under the conditions of penstock generally, understand? A. Exactly.

Q. I am directing your testimony to this particular penstock, and upon this particular point,—what sense would there be—

A. I can state three points if you will permit me.

Q. All right, I will permit you.

A. We will start at the flume leading into the penstock, at the trommel or screen for handling the

(Testimony of L. S. Robe.)

material that comes down with the water, should that get out of kilter and the material slip over into the penstock, so called, and thence down that 30-inch pipe, it would only be a short time before there would be a plug in that pipe and the attendant back water and then an overflow. That is point one. Point two; we know that human nature at best is more or less careless. Suppose some man that had a grudge against the company should get hold of that key and close that valve down there—there would be trouble—there would be a back flow. That is point two. There might be slides that would come along—slides not attendant on this water line at all—that would come along and mash the pipe, or take it out altogether. That is point three.

Q. That is, it is possible that land slides might smash the pipe? [369] A. Yes, sir.

Q. Then the three reasons that you give for assuming that there might be an overflow here, are, first, somebody with a grudge against the company might turn this valve off; the other one is that the penstock might get out of order so that this pipe might be blocked up with debris? A. Exactly.

Q. And the other one is that land slides might come along and knock this pipe out altogether?

A. Yes, it might.

Q. All right. Now, let's turn to the flume. Somebody having a grudge against the company might put a rock in there and stop it up, might they not? A. It is possible.

(Testimony of L. S. Robe.)

Q. That would cause an overflow right above the rock, wouldn't it? A. It might.

Q. Something might happen over here and a big stump fall into the flume, or something else might block that flume at any point, might it not?

A. Yes.

Q. That would block the flume, wouldn't it?

A. Yes, sir.

Q. Or a land slide might come along and knock this flume out altogether? A. It might.

Q. That would cause an overflow? A. Yes, sir.

Q. Then all the conditions you spoke of in connection with the penstock would apply to the flume?

A. No, sir; you have an artificial condition there in the penstock which you have to take care of, and it behooves an engineer to take precaution to see that ample protection is given.

Q. You refer now to the valve?

A. The entire service pipe.

Q. This flume leads back a matter of three miles—that is considerably [370] longer than the pipe, isn't it? A. Yes, sir.

Q. Isn't it also a fact that that flume might break anywhere,—such things do happen?

A. I suppose so.

Q. You would not build a flume immediately under that flume for fear the flume might break, would you?

A. That is not pertinent to the case, 'Mr. Hellen-thal.

Q. That would not be good practice?

(Testimony of L. S. Robe.)

A. No, sir.

Q. You did not build another ditch in Dawson in the loose soil under your ditch in case that water should run over, did you? A. I don't think so.

Q. Or in Fairbanks, or any other place; did you?

A. No.

Q. Now, if there were in the mill a large tank, and if this water were extended and flowed into this large tank at the mill, which is used for equalizing purposes — you understand milling somewhat, do you? A. I do.

Q. You know such a tank is used where the penstock is not used as a reservoir, don't you?

A. Yes, sir.

Q. And that tank is used for the purpose of equalizing the flow? A. Exactly.

Q. You know it is very important to keep that flow pretty steady, don't you? A. Yes, sir.

Q. You know if that water diminishes in flow or pressure for one minute it may cause the loss of many thousands of dollars, don't you?

A. Yes, sir.

Q. And you know that that tank must always be kept at the same pressure all the time, don't you?

A. Certainly. [371]

Q. Now, when you have that water in that tank, if you were running a mill you would watch that tank pretty close, wouldn't you?

A. Certainly would.

Q. You would know at all times whether that tank was full or was not full, wouldn't you?

(Testimony of L. S. Robe.)

A. I might not know—I should know.

Q. You should know, yes. Knowing that, you would install at that tank some system of signals, wouldn't you? A. Yes.

Q. Now, then, if at this tank at the lower end of this pipe you have installed, we will assume, a system of signals so that as the water lowered in the tank a system of lights, green lights, would flash on in every corner of the mill, and have in addition to that an alarm that sounded immediately when the water got below a certain level, there wouldn't be much chance of any pipe stopping up and your not knowing it, would there?

A. I don't quite catch that question, Mr. Helenthal.

Q. If there should be showed to be installed in this case, or in any case,—I am not speaking of this particular case, but under the conditions I have given you—if the testimony should develop that there was in the mill a system of lights so arranged electrically that immediately as the water ceased overflowing at the spillway at the mill tank, when it got below the rim, say, a couple of feet, green lights would flash on in every floor of the mill, and in addition to that an alarm would sound that could be heard all over the mill, there wouldn't be much chance for you or anybody else in charge of the mill overlooking the water, would there?

A. No, not in such a case.

Q. You would do just exactly what you said a moment ago you should do, isn't that right?

(Testimony of L. S. Robe.)

A. If I understand the testimony, Mr. Hellenthal, that service pipe—30 inches diameter, was situated about 9 feet below the top of the penstock, so called, is it not? [372]

Q. I don't know.

A. Such a system of signals would give warning only for that service pipe and no further—it wouldn't tell you of the condition of your flume flowing into the penstock.

Q. No—if that service pipe were closed at the place where the valve is, for instance,—if some chap who had a grudge against the company should steal the key and close the valve, one second after he had closed that valve everybody in the mill would know it, wouldn't they, under the conditions I have named? A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir—ought to, according to your statement.

Q. If a slide should come down and knock that pipe out, one second after the slide hit the pipe everybody in the mill would know it, wouldn't they, under my statement?

A. That system of signals would give warning of lack of flow, but it would not give warning of excess of flow.

Q. If the pipe were knocked out by a land slide there would be a lack of flow, wouldn't there?

A. In that case, yes.

Q. That is my question, answer it, and we won't have so much trouble. Now, if, on the other hand,

(Testimony of L. S. Robe.)

a lot of rubbish would come down here,—if the trommel screen should break down, for instance, and a lot of rubbish should come down and absolutely clog that pipe and stop it up, one minute after the clogging took place those signals would flash on and everybody in the mill would know it, wouldn't they?

A. They would with that service pipe only, and not any other portions of the flume or the penstock proper.

Q. That is not what I am asking you, Mr. Robe. They would know that, wouldn't they?

A. With the service pipe only, Mr. Hellenthal.

Q. If the service pipe were clogged up with rubbish, they would know that, wouldn't they?

A. Yes, sir. [373]

Q. Those are the three instances to which you have referred, aren't they?

A. That is two, only.

Q. I have now given the man who stole the key and shut off the valve, and the land slide knocking out the pipe, and the rubbish coming down and clogging up the service pipe.

A. But it doesn't care primarily for my first point.

Q. What is your first point—see if I can take care of that?

A. The immediate entry from the flume into the penstock.

Q. How would that clog up the service pipe?

A. That is the most important point.

(Testimony of L. S. Robe.)

Q. All right—explain that—what that is.

A. The overflow right there might have been right in the flume close to the penstock, or it might have been in the penstock—you have set out the care taken as regards lights and warnings for the service pipe, but you failed to speak of any care of an overflow there, right at the end of the flume.

Q. All right—you mean up here? A. Yes, sir.

Q. Above the penstock?

A. Exactly that is the point.

Q. All right. Assuming that the flume should break above the penstock at any point, then the men in the mill would get the signal the minute the water in the pipe would run out, wouldn't they, whatever time that would take?

A. The point is, I take it this was blocked—the trommel or screen was blocked and caused an overflow.

Q. All right. Now, let's assume that the trommel screen blocks and that the water flows over the trommel screen, it cannot go over the trommel screen outside of the box and into the pipe both, can it? A. Not flow in both, no.

Q. All right. When the water overflows the trommel screen it [374] ceases to run into the pipe, doesn't it—that is, to the extent of the overflow? A. It ceases to run full, yes, sir.

Q. The mill tank ceases to get its full portion of water, doesn't it? A. Exactly.

Q. The lights will flash on, won't they?

A. Yes, sir.

(Testimony of L. S. Robe.)

Q. And you will have the warning just the same, won't you?

A. You should if it is a good system.

Q. All right. Now, did you ever examine this ground in the vicinity of where this penstock stood?

A. Never have been up there, Mr. Hellenthal.

Q. If that shows that at the end of this penstock there was a hog-back that drained into two gulches, one in each direction, and those gulches were the natural gulches and drainage running down the mountain, that would be sufficient drainage even for an overflow, wouldn't it?

A. It would have to be proven to be safe. It is a matter that could not be taken for granted, Mr. Hellenthal.

Q. That would indicate a safe drainage, wouldn't it.

A. Probably would if it flows in there.

Q. Your testimony is based entirely upon conditions that are hypothetical and have nothing to do with this particular case, isn't that true?

A. No, I think not.

Q. You know nothing about the conditions up here, do you?

A. Only the slide.

Q. I am speaking about this other matter now, about the flume.

A. I was trying to answer you clearly, the questions you asked me.

Q. With reference to conditions up at the penstock, you were never up there?

A. I never was there, no.

(Testimony of L. S. Robe.)

Q. You don't know what the drainage conditions are? [375]

A. I know the drainage conditions on the hill right at the point of the slide.

Q. But not above?

A. Not from being immediately on that ground at the old penstock, no.

Q. Now, how long was that ditch in Dawson?

A. It was about twenty-odd miles.

Q. How much water did it carry at its intake?

A. It was built for 500 inches—didn't have that much.

Q. Didn't carry quite that much? A. No.

Q. At the intake it was less than 500 inches, you think?

A. It was built for 500—but we would get—

Q. You would only get the maximum a short time in the spring, and it could at the intake carry 500 inches? A. Yes.

Q. How much could it carry at the place where it entered into the penstock?

A. It was slightly larger at the penstock—it had some taps—small streams.

Q. It was enough larger to take care of the other streams that came into the ditch?

A. It was—to prevent possible overflowing.

Q. That water flowed along the hillside, then, for 20 miles in the ditch that you have indicated?

A. Yes, sir.

Q. You say that water coming out at the flume level and flowing over this slide area you have ex-

(Testimony of L. S. Robe.)

amined would cause a land slide?

A. Absolutely.

Q. Running water? A. It surely would.

Q. Do you know what the slope of that hill is?

A. I think,—it is a variable slope at the present time. [376]

Mr. HELLENTHAL.—I think the maximum probably would be about, possibly, 35 degrees.

Q. In the neighborhood of 30 degrees?

A. Yes, roughly.

Q. That is a pretty steep runway for water, isn't it? A. Fairly steep.

Q. If you turned water loose at the upper end of that wouldn't the first thing it would do would be to cut a trench over the surface?

A. It depends on the character of your formation altogether.

Q. You know the formation up there, don't you?

A. You take a clay and gravel admixture and it would not cut as rapidly.

Q. How is that?

A. Take clay and gravel that is firmly imbedded and it would not cut as rapidly as in loam.

Q. No, that is true, but it would cut a trench just the same, wouldn't it?

A. It would cut more or less of a trench.

Q. Yes, if it ran long enough, of course. Now, isn't it a fact that the water would immediately follow that drainage and run down hill in a stream?

A. Water generally follows its lowest level.

Q. It would run in a stream, wouldn't it?

(Testimony of L. S. Robe.)

A. Yes, sir.

Q. It would wear the surface off, wouldn't it?

A. Yes, sir.

Q. Its action would be to wear—that would be its action, wouldn't it? A. Yes, sir.

Q. The fellows on Front Street would get practically clear water, wouldn't they? A. Oh, no.

Q. There might be a little mud in it.

A. I think it would be muddy—probably 75 per cent mud. [377]

Q. But the water would run right down hill right on to Front Street, isn't that true?

A. If it had the grade, yes, sir.

Q. If it had a grade of 30 degrees, as it has there, it would do just as your ditch in Dawson did, it would run, wouldn't it? A. Yes, sir.

Q. It would not soak in any more than it did in the bottom of your ditch, would it?

A. Any new ditch will loose probably 25 per cent of its moisture.

Q. In a dry country?

A. In any country, for a time.

Q. When your ditch is wet, in a wet country it will loose water?

A. Any new ditch will loose 25 per cent of its moisture until it makes itself—until it makes a puddle.

Q. Your ditch is on a slight slope?

A. On a slight slope.

Q. And the reason you put it on a slight slope is so it won't wear out, isn't that right?

(Testimony of L. S. Robe.)

A. Yes.

Q. If you had a ditch on the slope of this mountain-side it would wear out?

A. Depends on your material.

Q. If the material is the same as here and in Dawson?

A. You can build a ditch in pretty bad soil, if you want to run it—

Q. You can build a ditch and still have it flow even if the soil is pretty bad? A. Yes.

Q. If you build it straight up and down it will wear out, won't it? A. Yes.

Q. But if you built it at an angle of 30 degrees it wouldn't wear? A. No, sir.

Q. You would have a river there in a few days, wouldn't you? [378]

A. Of course there is another point,—if your ground is porous the water will drop out of sight.

Q. Loose some of it?

A. Loose most of it, yes.

Q. But on a slope of 30 or 35 degrees you would almost have a waterfall, wouldn't you?

A. Yes, sir.

Q. You have done some placer mining, I believe, Mr. Robe, haven't you? A. Yes, considerable.

Q. Now, we will assume here is a slope of 30 degrees, and here is a body of ground that you want to move, as a placer miner what would be the first thing that you would do?

A. Generally strip the soil of tundra, brush, etc.

Q. And about the next thing you would do would

(Testimony of L. S. Robe.)

be to cut away the toe here, wouldn't you?

A. Generally cut away the toe.

Q. That would be the next thing. Then you would get a stream and you would cut that back as far as you could, wouldn't you?

A. Generally undercut the toe, and cut from the top down.

Q. If you have water enough? A. Yes, sir.

Q. And pipes enough, you may have a stream running over the top? A. Yes, sir.

Q. But if you had water enough only for two pipes you would put both pipes right on here, wouldn't you?

A. If your ground is thawed, yes.

Q. I am speaking as if the ground is thawed, of course,—if you had three pipes you would put them on there?

A. That is a hypothetical question,—you would use one or two pipes for handling the material in front of the conveyor.

Q. You would use one pipe down below here to get the material into your flume?

A. It would be pretty close,—

Q. Whatever it would be, but you would not use any pipe up [379] above here, would you?

A. Not necessarily.

Q. You would put your water down here and undercut it, wouldn't you?

A. Yes, in hydraulicking.

Q. Then you would go to work and wait for it to slide, wouldn't you?

(Testimony of L. S. Robe.)

A. It comes by friction, a little at a time.

Q. The slide doesn't come down all at once, it comes slowly?

A. It depends on your material.

Q. It depends on your material, but generally speaking.

A. Sometimes it masses at once, and sometimes slowly, and small.

Q. If you have loose gravel and stuff you have a small mass? A. Yes, sir.

Q. And if you have clay and more sticky stuff in it the mass is larger, isn't it?

A. Take the Gray mine in California, you would drop probably thousands of tons at a time.

Q. Depends on the clay content of the material?

A. Depends on the material.

Q. If you have loose material the material will slip off easy; if you have clay it will start further back and you get a bigger chunk, isn't that right?

A. No, I think clay generally acts more as a binder. Take examples of roads in this country,—where we have a little clay with our muck or gravel we have a better road, a more solid road, than we have without.

Q. Clay would cause the mass to stick together and come in a bigger bunch?

A. More tenacious. It don't generally come in bunches; it rolls up, generally—

Q. If you were making a cut in this bank here and you had gravel that contained a little clay, you would get a bigger bunch as a result of your under-

(Testimony of L. S. Robe.)

cut than you would if it were loose sand, wouldn't you? [380]

A. The more clay the less size—the clay is tenacious and hard to dislodge.

Q. You would get a larger bunch of soil here, you think, if it were sandy than if it was clay?

A. Absolutely; you would get a larger volume of slide with excess of sand and loam than you would with clay.

Q. You would? A. Absolutely.

Q. Now, if you were running water over the top here—if you have waste water in placer mining—you are familiar with Bowie on Hydraulics, aren't you? A. I have it.

Q. You know what Mr. Bowie tells you don't you? A. Yes.

Q. According to that treatise you placer mine by putting all of your hydraulic nozzles right at the bank, that is right, isn't it? A. Yes.

Q. Then if you have waste water that you cannot use at this place you let it run over here?

A. It has friction—it helps.

Q. It is better to run over the top than it is to run over here? A. Yes.

Q. But that is all the value it has?

A. Generally speaking.

Q. And that is all there is to the placer mining story. A. Yes.

Q. And your assumption here on the hillside is not based on such conditions as I have indicated

(Testimony of L. S. Robe.)

here, of an undercut here, or any of that sort of thing?

A. I don't see any connection between the two at all, Mr. Hellenthal.

Mr. HELLENTHAL.—You don't see any connection between the two but it probably might develop later on. That is all. [381]

Redirect Examination.

(By Mr. RODEN.)

Q. Now, if this trommel screen happened to clog up, Mr. Robe, where would the water go to?

A. It would have gone into the impound or penstock.

Q. And how would the water escape from the penstock?

A. If the valves were open in the service pipes, I presume that those pipes are adequately large to carry the water from the penstock.

Q. But if the trommel screen is blocked up so that water cannot get through the screen it never gets to the service pipe? A. It does not.

Q. Where would it go to in that event?

A. It would go over the edge of the flume, down the hill.

Q. Now, if an engineer were to instal such an appliance as we have described in this case, would he take into consideration—

Mr. HELLENTHAL.—That is not redirect and I object to it. I don't want to have to go into that.

The COURT.—You did not let him finish the question.

(Testimony of L. S. Robe.)

Q. Would he take into consideration the conditions as they existed below?

The COURT.—He may answer that question.

A. A competent man, certainly.

Q. And he would use care and caution in proportion to the possible damage it might do?

Mr. HELLENTHAL.—We object to that as immaterial and not redirect, and the witness is not qualified to speak.

The COURT.—Objection sustained.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) You don't think Mr. P. R. Bradley, and Mr. F. W. Bradley and Jack Richards are competent men, do you?

A. No, I didn't say that—I don't know that it was even built by them. I am just stating my convictions according to my practical experience.
[382]

Q. (By Mr. HELLENTHAL.) You would not think work done by Mr. F. W. Bradley was done by a competent man?

Mr. RODEN.—We object to that as immaterial and argumentative.

The COURT.—The objection is sustained.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

PLAINTIFF RESTS.

(Whereupon court adjourned until 10 o'clock Monday morning.) [383]

DEFENSE.

MORNING SESSION.

March 28, 1921, 10 o'clock A. M.

Mr. HELLENTHAL.—I wish to offer in evidence weather reports of Mr. Summers, the weather man received in evidence in the preceding trial. I will state to the Court that Mr. Summers has been ill, and we have agreed that his testimony given at the other trial may be read in evidence as soon as it is transcribed, so we will offer this now.

Mr. RODEN.—No objection.

The COURT.—Let me understand—you have stipulated that Mr. Summers' testimony in the case of Koski, administratrix, against the Alaska Juneau Mining Company may be received in this trial?

Mr. HELLENTHAL.—Yes, as soon as the stenographer can transcribe it.

The COURT.—And what you offer now is an exhibit in his testimony?

Mr. RODEN.—Yes. Of course with this understanding, if we wish to introduce additional testimony by Mr. Summers it may be done?

Mr. HELLENTHAL.—There is no objection to that,—we might want to ask him something. It is understood that the reading of this exhibit at this time may be waived?

Mr. RODEN.—Yes.

(Whereupon said weather report was received in evidence and marked Defendant's Exhibit No. 1.)

Testimony of W. B. Hargraves, for Defendant.

W. B. HARGRAVES, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. W. B. Hargraves.

Q. What is your profession? [384]

A. Mining engineer.

Q. Where were you educated?

A. Massachusetts Institute of Technology.

Q. That is the school that is generally referred to as the Boston Tech? A. Yes.

Q. Now, at that school did you, in addition to your course in mining engineering,—did you also take a course in geology?

A. Yes, sir; I took the geological branch of the the mining course.

Q. Under whom did you take that course in geology—under what professor?

A. Professor Lingren was in charge of the geological department.

Q. He was at the head of the geological department? A. Yes, sir.

Q. There were other professors in the geological department? A. Yes, sir.

Q. Who is Professor Lingren?

A. He is one of the foremost geologists in the country—probably in the world.

(Testimony of W. B. Hargraves.)

Q. After leaving that school what did you do—did you pursue your profession? A. I did.

Q. Where? A. In Northern Ontario.

Q. Where else?

A. Then I came here in 1914, and have been here ever since that time.

Q. How long has it been since you left school?

A. Eleven years since I left school.

Q. It has been eleven years since you left school and you have followed your profession ever since?

A. Yes, sir.

Q. You have been in the Interior? [385]

A. Yes.

Q. You were there in what capacity?

A. Commonly known as scout engineer the first three years I was here.

Q. What they call an expert? A. Yes.

Q. For whom were you working at that time?

A. A syndicate.

Q. Who was at the head of it—who went in with you?

A. The last time I was in with Mr. Bradley, if that is the time you are referring to.

Q. At first you worked for a New York syndicate in the same capacity? A. I did.

Q. The last time you went in with Mr. F. W. Bradley of San Francisco? A. Yes.

Q. What year were you employed in that capacity by Mr. F. W. Bradley? A. The year 1919.

Q. And since that time you have been employed where? A. At the Alaska Juneau.

(Testimony of W. B. Hargraves.)

Q. You are doing engineering work there at the present time? A. Yes, sir.

Q. And also such geological work as they have to do at the mine? A. Yes, sir.

Q. Now, I direct your attention to a large map standing in the room and ask you if you have seen that map before? A. I have.

Q. Who made it? A. I did.

Q. Does that map correctly show the matters and things delineated upon it? A. It does.

Mr. HELLENTHAL.—I offer the map in evidence. [386]

Mr. RODEN.—No objection.

(Whereupon said map was received in evidence and marked Defendant's Exhibit No. 2.)

Q. Referring now to Defendant's Exhibit No. 2, commencing at the upper corner at the point marked "Lights," will you please explain to the jury what those lights are—the place where I am now pointing marked "lights"?

A. Those are lights that we have at that point in the tunnel, where the two portals branch, the old portal coming straight down on the map, and the new portal curving around so we can tram our ore cars there. There are three sets of lights in pairs, and those are always lighted there.

Q. That is at the point marked lights?

A. Yes.

Q. Now, where I am now running my pointer, at the place marked portal, is that what you refer to as the old portal?

(Testimony of W. B. Hargraves.)

A. That is the old portal, yes, sir.

Q. Is that now used for the purpose of tramming ore? A. No.

Q. What use is made of that portal?

A. Use that for a change room now.

Q. I mean what use was it put to, Mr. Hargraves, in 1920, at the time of the slide?

A. It was used for a passageway for the men; and then there was a ditch to carry water to the other end of No. 3 tunnel.

Q. The water ditch came from Gold Creek?

A. Yes, sir.

Q. Where did the flume line and ditch line commence on Gold Creek?

A. It commences way up above our bunkhouse and boarding-house, beyond the tunnel—probably over a mile and a half beyond the other end of this tunnel.

Q. It would be more than a mile from the point where you have marked “lights” there?

A. Oh, yes, far more than a mile,—I would say a mile and a half—I don’t know exactly. [387]

Q. The flume commences a mile and a half beyond that point, is that true?

A. I should say so; I don’t know exactly—that is merely a guess; I don’t know exactly.

Q. I am merely asking you approximately what the distance is from that point where the intake of the flume is to the place marked lights. How is the water carried from the intake of the flume to the mill?

(Testimony of W. B. Hargraves.)

A. Carried by flumes, and ditches and pipe-lines.

Q. Now, commencing at the intake, how does the water run from there,—how is it taken out of the creek, through a flume or ditch? A. Flume.

Q. That flume extends how far?

A. Oh, that runs about 900 feet; then it goes into a tunnel.

Q. Now, in the tunnel how is the water carried?

A. Carried just in a ditch. There is no flume there—and it comes out of the tunnel again—at the mouth of Gold Creek tunnel, and is carried there in a flume to the other end of No. 3 tunnel.

Q. Now, No. 3 tunnel—that is up in the Jualpa Basin, right below Snowslide Gulch? A. Yes.

Q. That is the point you referred to where the water is again picked up in the flume?

A. Yes, sir.

Q. That is a mile or so, roughly speaking, up the basin from the point you have marked lights?

A. Yes.

Q. From there on it is carried in a flume to where?

A. It is carried in a flume to the other end of No. 3 tunnel.

Q. No. 3 tunnel—that is the tunnel that you have been testifying to, where the lights are?

A. Yes, sir.

Q. That is the tunnel that extends through Mount Roberts, that is [388] it, isn't it?

A. Yes, sir.

Q. Now, beyond the north portal of No. 3 tun-

(Testimony of W. B. Hargraves.)

nel—by north portal I mean the portal on the Ju-alpa side—between the Gold Creek tunnel and the north portal of No. 3 tunnel the water is carried in a flume? A. Yes, sir.

Q. Where is it carried with reference to the hillside of Mount Roberts?

A. Carried right along the hillside.

Q. Part of it on trestlework? A. Yes, sir.

Q. And part through tunnels?

A. No, there is none of it through a tunnel between those two points.

Q. That is entirely along the hillside until it comes to the north portal of No. 3 tunnel, then how is the water carried?

A. Carried through a ditch in No. 3 tunnel.

Q. And that ditch extends to where?

A. Extends to what is marked there “the old portal.”

Q. Where I now have my pointer, that is the old portal? A. Yes, sir.

Q. And that passes through the tunnel where the word “lights” appears? A. Yes, sir.

Q. Now, at the point “lights” there is a tunnel branching off and you have marked here No. 3 tunnel, what is that?

A. That is a branch to the new tunnel—the new portal, where your pointer is at the new tunnel.

Q. Where my pointer is now, at the point marked “new portal,” that is the portal of a new tunnel driven since the original tunnel was driven?

A. It is a cut-off to make the curve easier.

(Testimony of W. B. Hargraves.)

Q. And that was put in there since the new tunnel was driven? A. Yes. [389]

Q. And it joins the old tunnel at the point marked "lights"? A. Yes, sir.

Q. Now, the ore trains in running from the mine to the mill, what course do they take?

The COURT.—Do you mean what course do they take now?

Mr. HELLENTHAL.—No, I mean what course did they take in January, 1920.

The WITNESS.—They came out the new portal.

Q. They came out the new portal at the time of the slide? A. Yes, sir.

Q. And had been doing that for some time previously? A. Yes, sir.

Q. The ore trains took the course following No. 3 tunnel until you come to the place marked "lights," and then took the new tunnel out to the new portal? A. Yes.

Q. And thence to the mill? A. Yes, sir.

Q. The men in coming from the mine, where do they get off the train, if they ride on the train?

A. At the point marked "lights."

Q. Then where did their course lead them to?

A. Came out the old portal.

Q. Came out the old portal, down this way, to the place you have marked "old portal"?

A. Yes, sir.

Q. Now, we come down to a place indicated on your map as "Snowsheds," where were they with reference to the old portal at the time of the slide?

(Testimony of W. B. Hargraves.)

All of these things that I am asking you about now, I mean where were they at the time of the slide, January 2d, 1920?

A. Just outside of the mouth of the old portal.

Q. There were snowsheds there at that time?

A. Snowsheds there, yes. [390]

Q. How were those snowsheds constructed?

A. They were constructed of heavy timbers—they are right in the gulch there, Mr. Hellenthal.

Q. What I mean more especially, Mr. Hargraves, what was their purpose, and what was the purpose of constructing the snowsheds—what purpose did they serve?

A. To shed the water coming down Portal Gulch, to protect the portal.

Q. The water came down from where?

A. About the line of the gulch on the ground above.

Q. And those snowsheds were put there for that purpose. Now, immediately below the roof of the snowsheds, what existed there at that time?

A. We had the flume—the flume came out from the old portal—the flume ran right along the edge of those snowsheds.

Q. The flume came out of the old portal from a point here, at the snowsheds and ran at the edge of them? A. Yes, sir.

Q. Is that flume still there?

A. No, sir; it has been moved under the platform.

Q. But it was there at the time of the slide, Janu-

(Testimony of W. B. Hargraves.)

ary, 1920, and for some time prior to that?

A. Yes, sir.

Q. Where did the flume lead to from this point where the sheds were?

A. Leads over to a penstock.

Q. Leads over to a point marked "penstock" on the map? A. Yes, sir.

Q. I direct your attention, Mr. Hargraves, to a photograph, and ask you to state when that was taken—you were present when that was taken?

A. Yes, sir.

Q. When was that picture taken?

A. January 7, 1920. [391]

Q. From what point was that taken, approximately?

A. Just outside of the snowsheds, looking towards the penstock—to the right of the snowsheds, over on the railway track.

Q. Does that picture correctly represent the conditions as they were there at the time of the slide?

A. It does.

Q. I mean with reference to the buildings?

A. Yes, sir.

Q. And the water flowing over there was flowing over there at the time you took the picture?

A. Yes, sir.

Mr. HELLENTHAL.—I offer this picture in evidence.

Mr. RODEN.—No objection.

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 3.)

(Testimony of W. B. Hargraves.)

Q. The upper part of this picture, what does that represent? A. That is the snowshed.

Q. Below that, what is that?

A. That is the flume.

Q. How was the flume below the shed covered, if at all?

A. Covered with this slanting roof to keep the water and the snow from running into the flume.

Q. I now direct your attention to another photograph and ask you to state whether that was taken in your presence? A. Yes, sir.

Q. When was that taken—what day?

A. The 7th of January, 1920.

Q. That was the same time the other picture was taken? A. Yes, sir.

Q. Where was that picture taken from?

A. That was taken from Gastineau Avenue, just below the slide.

Q. Does the water running over the snowsheds in the previous picture, and over the flume, show in that picture? A. Yes, sir. [392]

Mr. HELLENTHAL.—I will offer this picture in evidence.

Mr. RODEN.—No objection.

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 4.)

Q. Now, Mr. Hargraves, have you observed this water running over the snowsheds and then shooting off on the flume, on other occasions?

A. Yes, sir; several times.

(Testimony of W. B. Hargraves.)

A. Under what conditions would the water run that way?

A. Oh, only on comparatively heavy rainfall.

Q. Whether it came from melting snow or heavy rainfall?

A. Ordinary rainfall doesn't show.

Q. Exceptionally heavy rainfall or run off of heavy snow?

A. There is some water comes down in an ordinary rainfall, but not to amount to anything.

Q. Have you observed it on Front Street on any occasion?

A. I observed it on Front Street the day that picture was taken.

Q. What appearance does the water shooting over the flume make from Front Street—how does it look?

Mr. RODEN.—We object to what appearance it will make—it is drawing a conclusion. Let the jury draw their own conclusion as to what appearance it makes.

The COURT.—Everything calls for a conclusion.

Mr. RODEN.—It isn't his place to draw the conclusion.

The COURT.—How is he going to describe it unless he tells how it appears? What do you mean by what appearance does it make—do you mean how it appears to him?

Mr. HELLENTHAL.—Certainly.

The COURT.—He may testify how it looks—how does it look?

(Testimony of W. B. Hargraves.)

The WITNESS. — Anybody looking up there would see the biggest part of the water, and they would think it was coming out of that flume.

The COURT.—That was not the question exactly.

Q. How does it look—does it look like water coming from the [393] top of the flume?

A. It looks as if it were coming from the top of the flume, yes.

Q. Does it look like one stream from Front Street?

A. Yes, it looks like one big stream.

Q. And the width of that stream, would that depend upon the volume of water coming over at the time you looked at it? A. Yes, sir.

Q. Now, I want you to step down here and point out to the jury on this Exhibit No. 4 the place where that water flows over.

Q. Here is the top of the snowshed, here is the water coming over here, and here is the flume.

Q. Now, I show you here another picture, and ask you if you were present when that was taken?

A. Yes, sir.

Q. Where was this picture taken from?

A. That was taken from the Pacific Coast warehouse—freight sheds.

Q. That is on the Pacific Coast wharf?

A. That is on the Pacific Coast wharf—on the new wharf.

Q. Taken on the same day?

A. Taken on the same day.

Q. In your presence? A. Yes, sir.

(Testimony of W. B. Hargraves.)

Mr. HELLENTHAL.—I offer that in evidence.

Mr. RODEN.—No objection.

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 5.)

Q. Calling your attention now to Exhibit No. 5, does that also show that stream running from the top of the flume there? A. It does.

Q. I wish you would step down here and show the jury just where that stream shows in that picture, and how it shows.

A. There is the snowshed, and there is the flume.

Q. As it shot off of the flume did it shoot out from the flume? [394] A. Yes.

Q. Didn't drop right down but shot out from it?

A. It would splash where it dropped from the shed.

Q. Now, on the snowsheds the water runs in how many gutters? A. Runs in two, principally.

Q. Two gutters? A. Yes.

Q. And the gutters point in what direction as they come off the sheds and on to the flume?

A. They converge.

Q. They run together? A. Yes, sir.

Q. So that the streams of the two gutters would run into one as they hit the flume?

A. Well, nearly so.

Q. That is, they would not come right together, but they would hit the flume and come close together, so in emerging from the flume if there was a large volume of water it would appear to be one stream?

Mr. RODEN.—We object to that question. I do

(Testimony of W. B. Hargraves.)

not understand that any water comes from the flume. The witness says it comes from the snowshed.

Mr. HELLENTHAL.—All right—I will make that plainer.

Q. The water from those two gutters—

Mr. RODEN.—Which two gutters?

Mr. HELLENTHAL.—On the snowsheds.

Mr. RODEN.—It hasn't been shown that any gutters exist on the snowsheds.

Q. Where did the gutters exist, so Mr. Roden will understand it?

A. One gutter comes down in this corner and the other gutter comes here.

Q. Can you make a mark there so it will be visible showing those two gutters and the direction they take? A. I think so. [395]

Q. Those were the two gutters that were there at that time. Now, in what direction did they point as they emptied on the roof of the flume—the flume is right below them?

A. They converge, as drawn on the map there.

Q. That is, they come towards one another?

A. Yes.

Q. Come together? A. Yes.

Q. And the water coming from those two gutters comes together and falls on what?

A. Falls on that shed that is on the flume.

Q. On the roof of the flume; and as it comes out from there where does the water come from as it spills off down the hill?

(Testimony of W. B. Hargraves.)

A. It comes from that shed on the flume.

Q. Comes from the roof of the flume?

A. Yes, sir.

Q. That is a mere cover on the flume?

A. Yes, sir.

Q. Lays right on top of the flume?

A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. All right. Now, one witness has testified here, I think, of seeing some water at a bend in the flume. Will you describe to the jury where a bend in the flume occurs? Is it a bend, as the witness here has testified to? Did you hear his testimony?

A. No; there is a bend of the flume right at this point, and another bend under the change house. Those are the only two bends—

Q. The bend under the change house, does that show from the street? A. I don't think so.

Q. Where is that bend that shows from the street with reference to the water that flows over the flume? [396] A. Practically at that point.

Q. Now, what is the distance from the portal of the old tunnel to that point where the water comes over the flume during heavy rains, as you have testified to? A. About 15 feet.

Q. About 15 feet in what direction?

A. To the northwest—towards town.

Q. Northerly from the portal of the tunnel to the place where the water comes over the roof of the flume is about 15 feet?

(Testimony of W. B. Hargraves.)

A. Yes, sir.

Q. And that was the condition on January 2, 1920? A. Yes.

Q. Now, what is the distance from the top of that flume where the water shot over to the ground?

A. Oh, it would be about 20 feet.

Q. About 20 feet? A. Twenty or 25 feet.

Q. The flume is not there now so you cannot measure it? A. No.

Q. You have taken the measurement, however, from the top of the roof of the shed to the ground?

A. Yes, sir.

Q. And that is about how much?

A. That is about 25 feet.

Q. And the distance between the roof of the shed and the flume would be 3 or 4 feet?

A. Would be about 5 feet.

Q. All right, so the distance from the top of the roof of the flume to the ground straight down would be about 20 feet? A. About 20 feet.

Q. What is the condition of the hill there, as to whether it slopes or not?

A. It is very steep right there.

Q. If the water shot out from the roof of the flume the water would [397] hit the ground at a distance of approximately how many feet?

A. Perhaps 5 or 10 feet more—might be nearer 30 feet if it shot out 3 or 4 feet.

Q. Depends on the volume of water and the distance it shot? A. Yes.

Q. But it would at least be 30 feet—

(Testimony of W. B. Hargraves.)

A. It would at least be 25 feet.

Q. Maybe 25 feet, and if there was a larger volume of water and it shot out more it might be 40 feet?

A. I don't think it would be that far.

Q. You don't think it would be that far, but it would be a distance of 25 or 30 feet?

A. Twenty-five to thirty feet, yes, sir.

Q. That flow of water that came over the top of the flume there, as it ran off, in what direction did that run—in what direction did it face?

A. Faces Gastineau Avenue or Franklin Street.

Q. In what direction would it face to a man—do you know where the soda works are on Front Street? A. Yes, sir.

Q. From there to the city wharf, in what direction would it face to a man standing in that neighborhood? A. He would be facing it.

Q. Looking right into it?

A. Practically, yes, sir.

Q. And to a man standing at the Femmer and Ritter wharf, how would it be there?

A. Would be about the same—wouldn't be any great difference.

Q. A man on Gastineau Avenue, somewhere in the vicinity of the slide, how would that be—about the same?

A. Would be right below it—be facing it, if he was in a position to see it.

Q. And one being in that vicinity, anywhere in there, the stream would come right down and he

(Testimony of W. B. Hargraves.)

would see the broad side of it?

A. Yes, sir. [398]

Q. He couldn't see the breadth of it?

A. I don't know what you mean by the breadth of it.

Q. He couldn't see the thickness of the flow?

A. No, he couldn't tell how thick it was.

Q. He could tell how wide it was?

A. Yes.

Q. Coming now to the penstock, the penstock that is shown on this map, that was there in 1920, on the day of the slide? A. Yes, sir.

Q. You are familiar with the construction of that penstock? A. Yes, sir.

Q. There is evidence here with reference to a spout that came out of it—do you know where that spout was situated? A. Yes, sir.

Q. What kind of a spout it was, too?

A. Yes.

Q. Now, where was that spout situated on the penstock—on what side of it?

A. On the north side.

Q. The penstock was a square building?

A. Yes, practically—a rectangular building.

Q. And the penstock was out on the face looking towards the north? A. The spout, you mean?

Q. Yes, the spout. A. Yes.

Q. How is that indicated on your map—does the spout of the penstock show on this map?

A. Yes.

Q. Now, in what direction did that spout point

(Testimony of W. B. Hargraves.)

with reference to Front Street?

A. It is north, parallel to Front Street—practically parallel.

Q. The direction of the spout is practically the same as the direction of Front Street?

A. Yes, practically so. [399]

Q. Water coming from that spout would flow in what direction?

A. Flow in the direction parallel with Front Street, approximately.

Q. A person standing on Front Street, in the neighborhood of the soda works or anywhere down there, would see what part of the flow coming out of the spout?

A. He would be looking at it edgeways.

Q. Could he see the width of it at all?

A. No, he couldn't see the width of it at the soda works.

Q. He could only see the thickness of it?

A. Yes, sir.

Q. The depth of it, in other words?

A. Yes, sir.

Q. It would be flowing up towards Mount Juneau—in that direction?

A. That general direction, yes.

Q. What is the distance from the spout to the portal of the tunnel?

A. I think I have it marked there, 128 feet.

Q. Now, what is the distance from the spout to the ground? A. It is about 6 feet.

(Testimony of W. B. Hargraves.)

Q. Now, Mr. Hargraves, what was that spout put there for?

A. Discharge refuse, leaves, or whatever solid matter came through with the water.

Q. Screened out of the water how?

A. Screened with the trommel screen—the revolving screen.

Q. I wish you would describe that screen to the jury.

A. Well, it is a small trommel screen—it is conical, like a section of a cone, about 7 or 8 feet long—I don't know the exact size of it—about 3 feet in diameter—and it is like a cylinder of wire, driven by a motor, and the water comes in from the flume into one end of this screen, and the water drops through the screen; any refuse, leaves, or anything of that sort, is carried by the motion of this screen—the spiral motion of the screen, and drops out the chute at the other end. [400]

Q. The water comes in at the upper end of the screen—the screen lies almost horizontally?

A. Oh, practically so.

Q. And flows through it into what?

A. Into what we call a penstock—the water drops through that screen.

Q. And the leaves and moss and things of that kind, whatever there is in the water, what becomes of that?

A. The motion of that screen will carry it to the spout at one end of the penstock—the other end of that building.

(Testimony of W. B. Hargraves.)

Q. What is that spout put there for?

A. To discharge the leaves and solid material.

Q. Whatever might be in the water?

A. Yes, sir.

Q. What does the screen do—does it revolve or stand still? A. Revolves.

Q. Driven how? A. By an electric motor.

Q. What effect does the revolving of the screen have with reference to the moss and stuff?

A. The moss is discharged by the spiral movement of the screen; or if there is not enough the leaves and moss perhaps would not be carried through—they would simply drop to the bottom of the screen—it has both effects.

Q. The purpose of having a revolving screen is to keep the screen clean? A. Yes.

Q. To keep the moss or whatever there may be in the screen from stopping up the meshes?

A. Yes.

Q. And the spout was there to take care of that refuse matter? A. Yes.

Q. From the penstock where was the water carried, at that time?

A. Carried through a pipe-line system. [401]

Q. Leading from where?

A. Leads from the penstock to the mill—then there is a branch to the city high pressure line.

Q. How many pipe-lines led from the penstock?

A. Three.

Q. Where did they lead to, and what was their size?

(Testimony of W. B. Hargraves.)

A. The largest pipe left the penstock—

Q. Let us start with the small one.

A. The 4-inch line from the penstock, that comes down and goes to the power-house—the water from that is used for boiler feed purposes.

Q. That 4-inch line leads to the point at the extreme right-hand corner of your map marked “power-house,” doesn’t it? A. Yes.

Q. Where is the next pipe-line?

A. There is an 8-inch line that leads from there down to the corner of the administration building.

Q. It leads to this point marked on your map “administration buildings”?

A. Yes, sir.

Q. What is that water for?

A. That is for the city fire protection system.

Q. What other pipe leads from the penstock?

A. There is a 30-inch pipe leads from the penstock.

Q. What is the size of the city pipe—did you state?

A. It is an 8-inch pipe down as far as the administration building, from there on it is 12.

Q. What other pipe leads from it, now?

A. A 30-inch pipe leads from the penstock—that is the main line.

Q. Where does that lead to?

A. Leads to the mill; it is reduced to 20 inches then before it gets to the mill.

Q. Now, that leads to the place marked on your map “8000-ton mill”? A. Yes, sir. [402]

(Testimony of W. B. Hargraves.)

Q. That is the mill you mean? A. Yes, sir.

Q. Right alongside of that mill is a round circular affair that is marked "mill tank"—what is that?

A. That is where the water leads to directly.

Q. That is where the 30-inch pipe discharges?

A. Yes, sir.

Q. Is that right? A. Yes.

Q. Is that 30-inch pipe a 30-inch pipe all the way?

A. No, sir; it has two reductions—30 to 24 and 24 to 20.

Q. The first reduction is from 30 inches to 24 inches? A. Yes.

Q. Where is that reduction made?

A. It is about 175 feet from the penstock.

Q. The point you have marked here "30 to 24 reducer"?

A. That is about the place, yes, sir.

Q. And the pipe-line is the line indicated on your map as "pipe-lines"—is that right?

A. Yes, sir.

Q. Is the pipe again reduced?

A. Yes; about where your pointer is from 24 to 20 inches.

Q. From there on is it again reduced?

A. No; 20-inch line from there to the mill tank.

Q. That discharges right into the mill tank?

A. Yes, sir.

Q. Now, at the mill tank, what is there there in the way of an overflow, if anything?

(Testimony of W. B. Hargraves.)

A. We have an overflow from the top of the mill tank to the tailings flume.

Q. That is marked on your map "tailings flume"?

A. Yes, sir.

Q. And the point that is marked "overflow" is the overflow from the mill tank?

A. Yes, sir. [403]

Q. What is that overflow designed to do?

A. That is to take care of the surplus water.

Q. Any surplus water occurring at any time flows over at that point? A. Yes, sir.

Q. What use is made of that surplus water?

A. It is used as a booster to help move the tailings.

Q. To help move the tailings down the tailings flume? A. Yes.

Q. Do you know what, if any, contrivances there are in the mill—do you know what the situation is at the mill with reference to the necessity of keeping this flow steady?

A. Why, that is so in all mills—you have to have a steady head.

Q. Have to have a steady flow?

A. A steady flow—that is, an even pressure on your water system. If you don't you are in trouble all the time.

Q. The pressure has to be kept stationary, at a fixed point?

A. Yes, sir; even a small variation will cause trouble.

Q. And the mill tank that you refer to and which

(Testimony of W. B. Hargraves.)

is marked on the map as "mill tank" was put there for that purpose? A. Yes, sir.

Q. For the purpose of equalizing the pressure?

A. Yes, sir.

Q. Do you know what, if any, contrivances were installed there at the time to notify people in the mill if the water ceased flowing?

A. I have heard about them—I don't know about them.

Q. That doesn't come within your department?

A. I know they are there now.

Q. That is another branch of the work. All right? Do you know the size or carrying capacity of the flume line leading to the penstock?

A. Yes, sir.

Q. You have measured that yourself?

A. Yes. [404]

Q. What is the carrying capacity of the flume line leading to the penstock?

A. You refer to the flume from the portal?

Q. I refer to the carrying capacity of the flume at its smallest place, of course—how much water can be carried to the penstock through the flume?

A. All that can come is what can come through the ditch in No. 3 tunnel—that is only about 20 cubic feet per second.

Q. Now, Mr. Hargraves, what is the difference in elevation between the penstock and the mill tank?

A. Oh, it is about 125 feet.

Q. The mill tank is 125 feet lower than the penstock? A. Yes, about that.

(Testimony of W. B. Hargraves.)

Q. The pressure on the water there would be 125 foot pressure, about, if the pipe were full?

A. Yes, and if you had the mill tank closed up in any way.

Q. Yes, I know—that is the head above it?

A. That is the head above it—there isn't that pressure.

Q. The pipe leading from the penstock to the mill tank, was that closed or open?

A. Open.

Q. The flow was steady into the mill tank?

A. Yes, sir.

Q. There was nothing to disturb it at the mill tank—there is no nozzle there, or anything of that kind?

A. No, sir.

Q. Just served as a pipe to let the water run through freely?

A. Yes, sir.

Q. You have already testified, now, I think, that you measured the ditch leading through No. 3 tunnel?

A. Yes, sir.

Q. And that ditch is part of the line carrying the water to the penstock?

A. Yes, sir. [405]

Q. No water could come to the penstock, I mean, except such as could pass through that ditch?

A. That is all.

Q. What is the size of the ditch—the carrying capacity?

A. About 20 cubic feet per second.

Q. Have you also calculated the carrying capacity of the pipe leading from the penstock to the mill tank?

A. Yes, sir.

Q. What is the capacity of that pipe-line?

(Testimony of W. B. Hargraves.)

A. About 45 cubic feet per second.

Q. A little more than twice as much as the flume leading into the penstock? A. Yes, sir.

Q. The wooden part of the flume leading into the penstock would carry more water?

A. Would carry more water than the ditch through No. 3 tunnel.

Q. If the ditch were as large as the wooden part of the flume it would carry approximately—

A. What the pipe-line would carry—about 45.

Q. Approximately what the pipe-line would carry? A. Yes, sir.

Q. The two would be about the same size, but because of the fact that the water had to be carried through that ditch the wooden part wouldn't run more than half full?

A. Couldn't run more than half full.

Q. Under those circumstances could any water ever overflow at the penstock? A. No, sir.

Q. No possible chance?

A. No, sir; water cannot overflow from the penstock; water stands in that pipe-line 7 or 8 feet below the penstock and that is the highest it can get.

Q. The legend on that map "where water overflowed sheds," that is the point you have referred to as the place where the water [406] ran off over the flume, about 15 feet north of the portal?

A. Yes, sir.

Q. And you have marked here "distance of spout to the ground, 6 feet"—that is the spout at the penstock—the discharge spout for the moss?

(Testimony of W. B. Hargraves.)

A. Yes, sir.

Q. Now, the map also shows at the lower end a point marked "office"—what office is that?

A. That is our general office.

Q. The general office of the Alaska Juneau Company down near the wharf? A. Yes, sir.

Q. Also a place marked "warehouse"—what is that?

A. That is our warehouse supply office—one of our warehouses.

Q. And the incline here marked "wharf incline tramway" at the extreme right hand of the map, what is that?

A. That is the tram that goes from the wharf to the main tram system to the mine—that is the only way we can get our supplies up to the main line.

Q. That is the way the supplies are taken from the wharf to the tram? A. Yes.

Q. That is an incline leading up to the level of the railway? A. Yes, sir.

Q. The mill marked "8,000-ton mill"—that is the big mill? A. Yes, sir.

Q. Sometimes called the ball mill?

A. There are balls in it.

Q. That is the new mill?

A. That is the new mill, yes.

Q. The place up above there where the tramway apparently comes across a portion of the mill, what is that?

A. That is the tipple of the mill, where the cars are dumped. [407]

(Testimony of W. B. Hargraves.)

Q. That is the uppermost part of the mill?

A. Yes, sir.

Q. And that is referred to as the tipple?

A. Yes, sir.

Q. The square here, what is that?

A. That is the stamp mill.

Q. Also used for crushing rock? A. Yes.

Q. And was being used at the time of the slide?

A. Yes, sir.

Q. And the ball mill was running at that time,

A. As far as I know—I wasn't there then.

Q. They were in operation, I mean—I don't mean they were running at that moment, but during that period these two mills were in operation?

A. Yes, sir.

Q. The line marked as coming through the new portal and down towards the tipple of the mill as the "main tram"; what is that?

A. That is a double track—part of our main line system from the mine—

Q. That is part of the double track railroad system leading from the mill to the mine; is that right? A. Yes, sir.

Q. Now, the little square near the sheds, between the sheds and the penstock marked "change room," what is that?

A. That is the No. 3 change room, where the men used to change, who live in town going up that way to work.

Q. From the change room at that time was there anything in the way of a trail leading downtown?

(Testimony of W. B. Hargraves.)

A. Yes, sir.

Q. Is that indicated on the map?

A. Yes, a parallel line.

Q. Those two little parallel lines that are marked "trail" is the trail that goes from the change room down towards town? A. Yes, sir. [408]

Q. Down the slope of the hill? A. Yes, sir.

Q. Now, on your map there is a trail marked "Trail to Harris Street," what is that?

A. That is a trail that goes to Second and Harris—that branches off from the other trail.

Q. Branches off from the other trail at the point indicated on the map? A. Yes, sir.

Q. And I think you have already said that what is marked "administration buildings" here, that is the concrete foundation that is on the hillside?

A. Yes, sir.

Q. Now, you have a legend here, "Gastineau transmission lines"—I wish you would explain to the jury what that represents.

A. The Gastineau transmission lines refer to these two lines, the one with the dash and three dots, and dash and two dots.

Q. Those are transmission lines belonging to what company?

A. The Alaska Gastineau Company. This one is the steel tower line and this one is the pole line.

Q. Which one is the pole line?

A. The one with the circle is the pole line; the steel tower line is the squares.

Q. What transmission lines are those—what are

(Testimony of W. B. Hargraves.)

they used for? A. Used for power transmission.

Q. Used for transmission of electric current?

A. Yes, sir.

Q. There is another similar line there called "Alaska Juneau transmission line"—what does that indicate?

A. That is the electric current for the Alaska Juneau and Treadwell purposes.

Q. That carries electric current for the Alaska Juneau and Treadwell Companies on a similar line with the Gastineau? A. Yes, sir. [409]

Q. Also an electric transmission line?

A. Yes, sir.

Q. Where do those lines run with reference to the slide area, when they come to the slide area?

A. They cross the slide area.

Q. In the slide area what, if anything, did the Gastineau Company have in the way of a tower?

A. They had a steel tower there.

Q. Had a steel tower—how is that indicated on your map?

A. Indicated by the same convention as the other towers except that it is dotted in.

Q. That little square dotted thing there a little below the word "area" in what is marked "slide area" is the steel tower of the Gastineau Company?

A. Yes, sir.

Q. That is where it stood? A. Yes, sir.

Q. Did the Alaska Juneau have any towers in this slide area? A. No, sir.

Q. None—that was the only tower of any of the

(Testimony of W. B. Hargraves.)

transmission lines that was in the slide area?

A. Yes, sir.

Q. Now, did these two lines, that is the Gastineau Company and the Alaska Juneau Company cross at any point? A. Yes.

Q. Where did they cross?

A. Where it is marked on the map "Transmission lines cross here."

Q. At the place where you have indicated on your map "Transmission lines cross here," that is where the two cross? A. Yes, sir.

Q. Which one crossed up above?

A. The Gastineau line.

Q. Crosses over the Alaska Juneau?

A. Yes, sir. [410]

Q. How far was that from where the slide happened? A. Oh, say about 400 feet.

Q. What is the distance between the steel towers of the Gastineau Company, Mr. Hargraves?

A. Why, they vary—250 feet, somewheres along there—250 feet to 300 feet.

Q. Somewhere in that neighborhood?

A. Yes, sir.

Q. How many poles were there between the pole that was situated in the slide area—I mean when I say pole, tower—the tower situated in the slide area and the point where the wires cross?

A. One.

Q. There was one steel tower of the Gastineau line between the place where the wires cross and the place where the slide occurred? A. Yes, sir.

(Testimony of W. B. Hargraves.)

Q. And the Gastineau people had that tower right in the middle of the slide area? A. Yes, sir.

Q. Now, do you know how those wires are fastened to the poles, or is that outside of your—

A. No, I know how they should be fastened, but I don't know how they are fastened.

Q. How should they be fastened?

A. They are carried along the insulators, and then the wire wrapped around the insulators and tapped to the insulators—the wires themselves are not wrapped around the insulators—they are just passed by the insulators, and fastened by other wires.

Q. Would the wires slip back and forth?

A. Yes.

Q. They are not fastened themselves to the insulators, but fastened by other wires?

A. They are only fastened where they make a turn—if they make [411] a sharp bend they might be fastened.

Q. But they are loose so they will slip back and forth? A. Yes, sir.

Q. That is what I am trying to get at.

A. Yes.

Q. Did you examine the point marked on the map “slide area”—what does that represent?

A. Represents a mass of ground that moved out.

Q. That is the place where the slide occurred on January 2d, 1920? A. Yes, sir.

Q. The lines shown on the map, what do they represent?

A. Those round lines represent contour lines.

(Testimony of W. B. Hargraves.) .

Q. What do those contour lines show, Mr. Hargraves?

A. They show a line of points of equal elevation on the ground. I think I could explain it best by saying, a trail that was on the same level passing along the hillside at a given elevation, either up or down, any dip in the ground or any bulge in the ground would have to wave along that line.

Q. Each contour line would represent a trail that is perfectly level? A. Perfectly level.

Q. If you have a trail along the line of any of those contour lines it would be a perfectly level trail? A. Yes.

Q. There would be no difference in elevation at all? A. No.

Q. So that each one of those contour lines lays out a perfect level along the side of the hill, and the wave along the contour line—

A. Would represent a depression or shows a bulge in the ground.

Q. Now, along the line where this trail runs down the hill from the penstock in the direction of what is marked "slide area," what exists on the ground there with reference to this matter of elevation?
[412]

A. There is a shoulder of high ground on either side?

Q. A hog-back? A. A hog-back, yes.

Q. What occurs at the point above there marked "gulch"?

(Testimony of W. B. Hargraves.)

A. There is quite a gulch comes in there all the way down the mountain.

Q. All the way down the mountain? A. Yes.

Q. And that gulch runs way up above your map?

A. Yes, sir.

Q. And comes down the side of the hill there?

A. Yes, sir.

Q. At the place marked "gulch"? A. Yes, sir.

Q. At the place on the other side is another legend marked "Portal Gulch," what is that?

A. That is another gulch coming down on that side.

Q. That also comes from way up the top of the mountain?

A. Runs way up the mountain—I don't know how far.

Q. Runs up the mountain above your map?

A. Yes.

Q. And extends down to Gastineau channel?

A. Yes, sir.

Q. In that direction? A. Yes, sir.

Q. Along the line of the words "Portal Gulch"?

A. Yes.

Q. Between those two gulches what is there?

A. Well, I would say there is high ground between them, higher than either one of the gulches—a hog-back.

Q. Is there anything else in the way of another gulch right down there?

A. Yes, sir; there is a small gulch comes down right at this end of the change house. [413]

(Testimony of W. B. Hargraves.)

Q. That is near the penstock?

A. Yes, sir, on the other side of the penstock.

Q. And that drains in what direction?

A. That drains into Portal Gulch.

Q. Now, between the penstock and the upper end of the slide area, what exists there?

A. There is a trail there.

Q. I mean with reference to elevation—that is where the hog-back extends?

A. The hog-back extends up there, yes.

Q. That is a high ridge leading down the hillside?

A. A ridge—I don't know as I would call it a high ridge.

Q. I mean when I say high ridge it is higher than the surrounding country? A. Yes.

Q. The ground is higher there than it is on either side of it? A. Yes.

Q. Where is the drainage of that ridge?

A. On either side.

Q. One side drains into one gulch and the other into the other gulch? A. Yes.

Q. Where is the natural drainage at the penstock from the point where the spout comes out of the penstock?

A. I have marked it on the map there "natural drainage."

Q. Along the line marked on the map "natural drainage"? A. Yes, sir.

Q. And that indicates the natural drainage from that spout to where?

A. Where it comes in to where the water of

(Testimony of W. B. Hargraves.)

Portal Gulch goes down to the other end of the administration building.

Q. Would drain down towards Portal Gulch, naturally, unless there was something, a body of sand or ice or something of that character to divert the water at the place where the spout is—where would the water go that comes from that spout *go* [414] if there were nothing to divert it?

A. Go along that drainage into Portal Gulch.

Q. What kind of a gulch is Portal Gulch?

A. It is quite a gulch.

Q. It is a natural drainage where the water from Portal Gulch runs? A. Yes, sir.

Q. And this little gulch runs almost along the line of what you have marked "Portal Gulch"?

A. Yes.

Q. The water would find its way into that?

A. Yes.

Q. You have a tram here marked "mill tram," what is that?

A. That is the tram that serves the mill from the wharf, to take up supplies.

Q. You can take them up to the upper level, also, from the street?

A. You can take them up to the mill from the street; you cannot take them up to the main tram from the street.

Q. Now, returning to these electric wire lines, the point at which the Gastineau and the Alaska Juneau wires cross, that is about where with reference to the Gastineau pole line?

(Testimony of W. B. Hargraves.)

A. It is right—

Q. I mean with reference to the Gastineau poles on either side of that point?

A. It is practically midway between the two of them.

Q. It is where the sag in the wire, if there is any sag, would be the greatest? A. Yes, sir.

Q. Do you remember the distance, Mr. Hargraves, between the wires at the point where they cross?

A. No, I don't.

Q. You don't remember that? A. No.

Q. Now, you have examined the slide area?

[415]

A. Yes, sir.

Q. That is the place marked "slide area," and that is the place where the slide occurred on January 2d, 1920? A. Yes, sir.

Q. When did you make an examination of that ground?

A. The 7th of January, 1920.

Q. That was the first time you were there?

A. I might have been there the day before, but I am not certain.

Q. You were also up to the penstock at that time?

A. Yes, sir.

A. When you were up there at the penstock did you make an examination of conditions around about there? A. Yes.

Q. Did you look there to see what course the water, if any, flowing from the spout had taken?

A. Yes, sir.

(Testimony of W. B. Hargraves.)

Q. Now, describe to the jury the exact condition that you found at the penstock with reference to that matter.

A. Well, where the water flowed down, it flowed down on this side of the ridge from the penstock—from the spout—instead of where it had always gone before, on the other side, the line of natural drainage.

Q. Speak a little louder.

A. As shown by the contour lines, there is only a slight hog-back here, and the water came down in here—flowed on this side instead of down here, where it had always gone before.

Q. That is, the water followed the line of natural drainage as indicated upon the map?

A. This time it did not—it came on this side of this small hog-back—ran on this side.

Q. And in what direction did it run?

A. Into the trail.

Q. Ran until it met the trail at what point?

A. Right in here. [416]

Q. At this first bend. Now, between that point where the water drained into the trail and the spout did you examine the ground?

A. Yes, sir.

Q. What did you find there in the way of evidences of running water?

A. Moss, grass, and debris was laid down—turned down the hill—that is, you could see that water had run over it.

Q. You could see that the water had run there by

(Testimony of W. B. Hargraves.)

the moss and grass and debris that was laying there?

A. Yes, sir.

Q. What was the condition of the grass on the hillside—what I mean, was it matted and bending over, or was it standing up straight?

A. It was bending down hill, the way the water flowed.

Q. Did you make a careful examination of that entire water course from that place where the water came from the spout to where it ran into the trail?

A. I made an examination—I wouldn't say it was a very careful examination—I looked at it.

Q. Explain to the jury how careful an examination you made. Did you look at it—look it over?

A. Yes; I wanted to see where the water came down on that side, and I could follow the water by the way the grass was turned down.

Q. Was there any cut whatsoever in the soil?

A. No, there was no cut.

Q. Was there any scour from the spout there?

A. No, sir.

Q. Where the water dropped from the spout was there any hole? A. No; no hole.

Q. Explain exactly what you saw.

A. The only evidence that I could see where the water came down, as I say, I could tell by the way the grass was turned down the hill along where the water flowed—that is all. There was no difference below the spout from the way it had [417] always been. There was no evidence of any water

(Testimony of W. B. Hargraves.)

coming from the spout, below the spout.

Q. Or any other point? A. No.

Q. Was there any evidence of any ditch 6 to 8 inches deep and from 18 to 20 inches wide?

A. No, sir.

Q. Was there any evidence of any such ditch there at all? A. Not that I saw.

Q. If there had been any evidence you would have seen it, wouldn't you?

A. I think so.

Q. You were there for that purpose, weren't you?

Mr. RODEN.—Don't argue with the witness—he said he didn't see it.

Q. What is your testimony, that you didn't see such a trench there, or that there was no such trench there?

A. There was no such trench that I saw.

Q. What is your answer, was there such a trench there, or would you have seen it if there had been one there?

Mr. RODEN.—We object to that question. Let him say what he saw, not what he would have seen if it had been there.

The COURT.—I think he may ask that—it is a usual question to ask.

Q. How is that, Mr. Hargraves?

A. Yes, if there had been a trench there I would have seen it.

Q. Couldn't have escaped you—you know just exactly what the conditions were and those were such as you have described to the jury?

(Testimony of W. B. Hargraves.)

A. Yes, sir.

Q. In the trail itself was there any evidence of wash?

A. The same evidence that I saw above there; the grass was laying over on the sides of the trail.

Q. I mean in the trail where the water had run?

A. I didn't notice anything different there than what was always in the trail that time of year.
[418]

Q. Was there any evidence of wash?

A. No, no evidence of wash in the trail. You mean abrasion of the trail? There was no evidence of that—no evidence of abrasion of the soil or ground of the trail. The trail was too hard for that.

Q. Were there any other places where you could trace or see that water had been running in the trail?

A. Yes; by the way the grass was lying over on the edges of the trail—the sides of the trail, you could see where the water had been running.

Q. At this place right above the slide was there any evidence that water had spilled out of the trail going over the slide area?

A. Yes, the same thing—the grass was lying over there.

Q. Was there any cutting or abrasion there at that point? A. No.

Q. Leading down towards the administration building, how did the trail look there?

A. I didn't notice that part of the trail.

Q. Didn't notice that part at all. All right.

(Testimony of W. B. Hargraves.)

Now, coming to the slide area, you made an examination of the slide area, I believe you said, on that day—have you made an examination of it since?

A. Made it on January 7th. Yes, I have been up there since, several times.

Q. You are familiar with the conditions around the slide area? A. Yes, sir.

Q. Now, your map shows a dotted space here marked "Koski," what does that mean?

A. That represents the position of the Koski house as it stood, as near as I could put it on the map from the information I had.

Q. That is where the Koski house stood before the slide? A. Before the slide, yes, sir. [419]

Q. Then there is the word "cut" just above that dotted space, what does that indicate?

A. Indicates a bank there where there had evidently been a cut made from evidences on the ground.

Q. Now, leading down from the Koski house there is a black square called "Bach," what does that indicate?

A. That indicates the position of the Bach house.

Q. That house is still on the ground?

A. Yes, sir.

Q. There is another house called "Oja" in a black square, what does that indicate?

A. That indicates the Oja house.

Q. There is another house marked "Kyander"?

A. That indicates the present position of one of the houses that was moved by the slide.

(Testimony of W. B. Hargraves.)

Q. Is that the original position occupied by it before the slide? A. No, sir.

Q. Where was it before the slide?

A. It joined that small house above the Oja house.

Q. Stood up in the vicinity of the Koski house?

A. Yes.

Q. What did the slide do to that house?

A. Carried it down the hill to that position—just moved it.

Q. Just moved it down the hill. To what extent did the slide hit it?

A. I imagine it just hit one corner of it.

Q. Just enough to move it off its foundation. There is a line marked there "Gastineau Avenue," what does that indicate?

A. That indicates a portion of Gastineau Avenue below the slide—or Gold Street.

Q. The line marked "Franklin Street" indicates Front Street, doesn't it? A. Yes. [420]

Q. The buildings between Gastineau Avenue and Front Street that you have indicated there, what do they indicate?

A. Indicates buildings as they were before the slide as near as I could get the information; and the real black ones, they were there at the time I surveyed the ground, with the exception of one—one has since been torn down.

Q. The two buildings in black lines, they were there at the time you made your survey?

A. Yes.

(Testimony of W. B. Hargraves.)

Q. When was that? A. May 21st.

Q. What is this little building above the black line? A. That is still there.

Q. Do you know what that was?

A. A little shack.

Q. What is the other one down below that?

A. It appears to be a series of shacks or apartments—a long row of buildings.

Q. That is one of Mr. Goldstein's apartment houses? A. So I understand.

Q. These buildings in the dotted lines, what do those indicate?

A. Indicate buildings that were there before the slide.

Q. Those were buildings that were there before the slide? A. Yes.

Q. How did the slide affect this little building?

A. As far as you can tell it didn't affect that at all.

Q. And it did affect the other one below the apartment house?

A. As near as I can tell, it moved it 3 or 4 feet. There is a big stump that holds the corner of it—that stump is still there—that protected the building.

Q. Was that building damaged very much?

A. Didn't appear to be.

Q. The other little building is still there?

A. Yes, the other little building is still there.

[421]

Q. And the others you have marked in dots, they

(Testimony of W. B. Hargraves.)

were demolished by the slide?

A. They were damaged considerably.

Q. The other in the black square down on Franklin Street, what does that represent?

A. That represents Mr. Goldstein's store building.

Q. That is the present store that is still on the ground? A. Yes, sir.

Q. What course did the water take from the Koski house down to Franklin Street?

A. Practically straight down.

Q. Came down the low land there? A. Yes.

Q. Did it come straight or make some bend?

A. I think it made some bend—bent to some extent.

Q. What direction did it bend—where did it bend?

A. Down here it seemed to take a turn like that and throw it out here—curve it out like that. This piece of high ground here kept it from going over there.

Q. It followed the gulch down the low land?

A. Yes, followed the lowest place.

Q. There are other buildings in this neighborhood, aren't there, Mr. Hargraves? A. Yes.

Q. They are not shown on the map?

A. No, sir.

Q. All you attempted to show was Mr. Goldstein's buildings on his lot between Gastineau Avenue and Front Street?

A. That was all I was asked to show.

(Testimony of W. B. Hargraves.)

Q. I mean you show no other buildings except Mr. Goldstein's? A. That is all.

Q. That is speaking between Gastineau Avenue and Front Street, these buildings that occur there are all on Mr. Goldstein's lots, and they are in issue in this case? [422]

A. Yes, sir; as far as I know.

Q. You know from your examination of the ground—you surveyed it?

A. Yes; those buildings, I know about those—there may be more that belong to him—I wouldn't know about that.

Q. There may have been some buildings on these lots that you didn't know of but these buildings were there?

A. Yes; those buildings were there.

Q. There may have been some additional small buildings there that were not drawn to your attention so that you did not put them on the map?

A. No.

Q. You would not testify that these are all the buildings on the lots? A. No.

Q. But you do testify that these buildings shown here were on the lots? A. Yes, sir.

Q. There is another little house here called the "Morgan house," that is still on the ground?

A. Yes, sir.

Q. That is on the ground still, and shown in a black line on your map? A. Yes, sir.

Q. Lot 2 block D, how is that indicated on your map?

(Testimony of W. B. Hargraves.)

A. There is a dash line, block 2, or lot 2 block N, I think it is.

Q. That is the Koski lot?

A. That is the lot the Koski house was on, yes, sir.

Q. What is the width of that lot?

A. Fifty feet.

Q. What is the width of the Koski house?

A. As near as I could find out it was about 45 feet.

Q. In the neighborhood of 45 feet?

A. Yes.

Q. There was originally another house just below the Koski house, [423] called the Larson house?

A. I believe so, yes.

Q. That isn't shown on your map? A. No.

Q. Now, as shown here by your map what was the depth of the cut behind the Koski house at its deepest point?

A. When we made the survey, that is all I could tell—about 10 or 12 feet, I should think.

Q. Ten or 12 feet, somewhere along there?

A. Yes.

Q. What was the width of the slide as compared with the width of the cut?

A. They were the same.

Q. At the Bach house side the cut was the deepest? A. Yes, sir.

Q. On that side how far did the slide come over towards the Bach house, with reference to the edge of the cut—the end of the cut?

(Testimony of W. B. Hargraves.)

A. It came right over to the side of the Bach house—to the Bach house practically.

Q. Where with reference to the cut behind the Koski house as the evidence showed upon the ground at that time?

A. Just over to the corner of the cut. The slide and the corner of the cut at that spot were identical.

Q. That is, the boundary of the slide and the boundary of the cut at that time were the same?

A. Yes, sir.

Q. That you, could see at the time you made your survey? A. Yes, sir.

Q. On the other side, the evidences of the cut, were they so plain?

A. No, not so plain because the gulch comes in there.

Q. And because of the gulch the evidences did not exist as to where the cut ended. How wide was the slide at the point [424] where the cut is?

A. It was about 45 feet.

Q. How wide is the Koski lot?

A. Fifty feet.

Q. Where did the slide come with reference to the position of the house on the ground?

A. Came right behind it.

Q. And how did the slide compare in width with the house on the ground? A. The same.

Q. The same width. Now, at about that same time or within that same rainy spell—you are familiar with this hillside looking along here?

A. Yes, sir.

(Testimony of W. B. Hargraves.)

Q. How is the character of the hill at this point where I am now pointing, near the stamp-mill, as compared with the hillside at the Koski house—I mean with reference to the soil conditions?

A. The same thing practically.

Q. At that time, about that same time and during that same wet spell, the early part of January, 1920, what, if anything, occurred in the region of where I am now pointing in the way of a land slide?

A. A slide occurred there.

Q. What occasioned that slide?

A. A cut in the hillside.

Q. Who made the cut?

A. The Alaska Juneau made the cut.

Q. For what purpose?

A. To put in a hoist foundation.

Q. At the point where I am now pointing?

A. Yes, sir.

Q. The word “cut,” referring now the place marked “slide area” near the point marked “50-stamp-mill,” and the word “cut” as [425] it is there, what does that represent?

A. Represents where we made the cut for that hoist.

Q. When was the cut made?

A. The cut was made in December of 1919.

Q. When did this slide occur?

A. January 5th or 6th—somewhere around there—1920.

Q. You would not be sure as to the exact date?

A. I don't know whether it was the 5th or 6th—

(Testimony of W. B. Hargraves.)

I am pretty sure it was either one of those days.

Q. Now, what was the width of this slide, the slide referred to as being near the 50-stamp-mill, as compared to the width of the cut?

A. The same.

Q. Identical? A. Yes, sir.

Q. Were there any other slides on the hillside anywhere else in that neighborhood at that time or any other time? A. Not that I know of.

Q. Were there any other cuts in that neighborhood? A. Not that I remember.

Q. Was there any cut on either side of this slide?

A. There was a small cut on the side towards the stamp-mill.

Q. Where is that?

A. Between there and the stamp-mill.

Q. I mean immediately on the side of this—

A. No.

Q. Where was this with reference to a gulch—was there any gulch in the neighborhood of that slide?

A. No, there is no gulch there. There is a gulch on each side, but there is no gulch there.

Q. What was the size of the slide at the stamp-mill to which I am now pointing, as compared to the slide behind the Koski house?

A. It is nearly twice as big. You can see—they are on the [426] same scale on the map—it shows their relative plan and size.

(Testimony of W. B. Hargraves.)

Q. The mass that moved was twice as large as the mass that moved behind the Koski house?

A. Yes, sir.

Q. Had you built any bulkheads where this slide occurred? A. No, sir.

Q. At the time of the slide? A. No, sir.

Q. Was the place ready to construct a bulkhead?

A. No; we were hoping to get our foundation in before we needed to construct a bulkhead. We had a bulkhead in mind but we thought the ground would hold until we got the bulkhead in.

Q. And while you were going to build a bulkhead, you didn't have it built yet? A. No, sir.

Q. The ground was open and that is what caused the slide? A. Yes, sir.

Q. Was there any water running over that—any flume line or anything of that kind, in that neighborhood?

A. No, sir, no streams there at all.

Q. No flume line there at all? A. No, sir.

Q. Now, Mr. Hargraves, have you made cross-sections of those two slides? A. I did.

Q. Have you made an examination of the slide on the hillside? A. Yes, sir.

Q. Are you familiar with the character of soil that covers the bedrock there? A. Yes, sir.

Q. What kind of soil is it?

A. It is matter from the hillside—it is mostly clay with angular fragments of rock in it?

Q. Some soil? [427] A. Yes.

Q. And decayed vegetable matter?

(Testimony of W. B. Hargraves.)

A. On the surface, yes—matter that would come from the sidehill there.

Q. That clay soil, does that readily absorb water, or not?

A. It does not absorb it readily, no.

Q. It does not absorb it readily—it is almost impervious? A. Almost so.

Q. Now, how does running water, water running in a stream,—if water should come down, for instance, from a place like this penstock, running over that soil mass there, how would that affect that kind of soil, as to whether it would soak in or run off?

A. Most of it would run off—very little would soak in.

Q. What would the water do upon the surface if it ran there for any length of time in any quantity?

A. The only thing it would do would be to cut a channel for itself.

Q. Suppose a stream the size of a sluice-head,—do you know what sluice-head means in general terms? A. Yes.

Q. Suppose a sluice-head of water were turned loose at the penstock there and ran down over that ridge for any considerable time, what effect would it have upon the soil?

A. I don't know what you mean by a considerable length of time.

Q. I mean three days, for instance.

A. I don't think three days would have very

(Testimony of W. B. Hargraves.)

much impression—a sluice-head is not such a very great amount of water.

Q. I mean the amount of water that would run through a 12-inch box?

A. Yes, I know—it wouldn't have much effect on the hillside. If it had any it would gradually cut through the moss and cut a channel for itself.

Q. Would it have the effect of soaking in and causing a landslide? A. No, sir.

Q. Where would it become evident, if it ran very long, with reference [428] to the lower side of the hill,—if a stream were turned loose at the penstock, how long would it be before you would know it on Franklin Street, for instance?

A. Well, I couldn't say—you would know it pretty soon—it wouldn't take such a very great length of time.

Q. By pretty soon what do you mean—how long—an hour or two? A. Know it before that.

Mr. RODEN.—That is entirely speculative.

The COURT.—That would depend on so many circumstances that you have not told him about.

Q. Do you know the conditions on that hillside running down there, Mr. Hargraves?

A. Yes, sir, I know the conditions.

Q. You know what the soil conditions are through there? A. Yes, sir.

Q. You know what the slope is? A. Yes, sir.

Q. What is the slope? A. About 30 degrees.

Q. About 30 degrees from the horizontal. Now, under those conditions approximately how long

(Testimony of W. B. Hargraves.)

would it take the water, if it were turned loose at the penstock—you say it would run down in a stream and cut a channel for itself?

A. Yes, it would cut a channel for itself.

Q. How long would it be before it would be evident on Front Street?

A. Not very long—a comparatively short time—I am unable to state just how long.

Q. Could it run two or three days without becoming evident on Front Street?

A. No, I don't think so, unless there was some channel for it to run into which wouldn't be evident on Front Street.

Q. It would reach the level of Front Street, I mean? A. Yes.

Q. How long would it take to reach the level of Front Street? A. A very short time.

(Whereupon court adjourned until 2 P. M.)
[429]

AFTERNOON SESSION.

March 28, 1921, 2 P. M.

W. B. HARGRAVES on the witness-stand.

Direct Examination (Cont'd).

(By Mr. HELLENTHAL.)

Q. Mr. Hargraves, I now call your attention to a photograph marked Plaintiff's Exhibit "E," and I will ask you to look at that and state whether that represents about the condition that you found on the ground at the time you were first at the penstock after the slide. A. Yes, sir, it does.

(Testimony of W. B. Hargraves.)

Q. That is about a correct representation?

A. Yes, sir.

Q. I now call your attention to another picture marked Exhibit "G" and ask you whether that is about a correct representation of the penstock and the conditions you saw around there after the slide?

A. Yes, sir.

Q. These pictures are taken at different angles?

A. Yes.

Q. I refer now to a picture marked Plaintiff's Exhibit "F," and ask whether that is about a correct representation of conditions as they were at that time? A. It is, yes.

Q. Referring now to Exhibit "M," is that picture about a correct representation of the trail as it was at the time you saw it?

A. That is a picture of the slide, Mr. Hellenthal.

Q. Referring now to a picture marked Exhibit "E," is that about a correct representation of the trail as you found it at that time?

A. Yes, sir, it is.

Q. With reference to wash conditions and things of that kind? A. Yes, sir.

Q. How does that compare with the trail as it looked before the slide? A. Just about the same.

[430]

Q. And about the same as it looks now?

A. Yes, sir.

Q. Have you looked at these other pictures of the trail here? A. I have.

Q. Are they correct representations of the trail

(Testimony of W. B. Hargraves.)
as it was when you went up there?

A. The time I went up there, at that time, January 7th, you mean?

Q. Yes.

A. Yes; there was more ice then than is shown there. The bed of the trail—the character of the boulders and rocks is just the same—practically the same.

Q. And whatever wash there was there is the same as shown on those pictures? A. Yes, sir.

Q. And the conditon is almost the same as it was before the slide? A. Yes, sir.

Q. What was the condition with reference to the ice at the time you went up there?

A. There was some ice on the trail—I don't remember whether it was wholly covered or not, but I remember there were patches of ice there.

Q. You remember the trail was more or less icy?

A. Yes.

Q. Now, Mr. Hargraves, there is another matter that I neglected to interrogate you about—at the time that you examined the slide what, if anything, did you find in the slide area in reference to portions of the Gastineau tower?

A. Why, there appeared to be parts of two legs of the tower still there.

Q. Which legs of the tower did you find?

A. As near as I could determine they are the upper legs.

Q. Were they still fast in the ground?

A. To all appearances they are.

(Testimony of W. B. Hargraves.)

Q. *They* is, they had never been broken up?

[431] A. Merely bent over.

Q. They were bent over but were still in the ground? A. Yes, sir.

Q. Now, you say you have made a cross-section of this slide area—directing your attention now to a blue-print of a map, I will ask you to state whether that is the cross-section you referred to? A. Yes.

Q. That is of the slide area directly behind the Koski house? A. Yes, sir.

Q. Does that correctly represent conditions there? A. Yes, sir.

Mr. HELLENTHAL.—I offer that in evidence.

Mr. RODEN.—No objection.

(Whereupon said blue-print was received in evidence and marked Defendant's Exhibit No. 6.)

Q. Now, referring to Exhibit No. 6, that shows the position of the tower upon the ground, does it not?

A. Yes, sir.

Q. That is the tower to which you have referred as the Gastineau tower? A. Yes, sir.

Q. Now, Mr. Hargraves, this tower that shows on the drawing, that is the Gastineau tower?

A. Yes, sir.

Q. And the upper legs, up the hillside, those are the legs that you found still in the ground?

A. I think they are.

Q. As near as you could determine?

A. Yes.

Q. Now, you have already testified, I think, as to where the other tower stood? A. Yes, sir.

(Testimony of W. B. Hargraves.)

Q. That is some 300 feet from here? [432]

A. Three hundred feet each way, about.

Q. Now, this shows the thickness of the slide mass—this mass right here?

A. Yes, as near as it can be determined.

Q. As near as it can be determined from the conditions on the ground at the present time. Now, at the point where it hit the tower how did that slide mass affect the position of the tower on the ground—what happened to the tower, or what would happen to the tower, if this mass began to move slowly?

A. The tower would move.

Q. In what direction, and how?

A. The dip would lean down the hill.

Q. The dip of it would be downhill until after these legs broke, is that right?

A. I should think so.

Q. Well, now, if the dip of the tower leaned down the hill what effect would it have upon the wires between the next section of poles?

A. If there was any power it would probably go in jumps—that is, it would go down the hill, bend and stop, and cause a vibration in the wires.

Q. The tower would be shoved downhill and then stop, and then what would happen to the tower?

A. It might move back a little bit—might not—might swing back a little but not back to its original position.

Q. If it swung that way what effect would that have on the wires in the next section?

A. Make them vibrate—oscillate.

(Testimony of W. B. Hargraves.)

Q. In what direction would it cause them to swing?

A. They might swing either way—the movement of the tower might cause them to move and they might vibrate upwards or downwards probably—sideways, probably—go in all ways.

Q. At any rate it would cause them to vibrate and move? A. Yes. [433]

Q. You have also made a cross-section of this other slide, I think you said,—before I refer to that, does this cross-section show the position of the Koski house on the ground?

A. Yes, as near as it could be determined from what data I had.

Q. How much of a bank was there behind the Koski house according to evidence you found upon the ground and the data which was supplied you?

A. The original surface there showed about 10 or 12 feet of bank—there was a cut—the bank was 10 or 12 feet higher than the back of the house at that time.

Q. That cut shows on your drawing at the point where I have my pointer, is that it? A. Yes.

Q. And the Koski house—

A. Is that dash line.

Q. Right shortly below the tower? A. Yes.

Q. And that place where the surface drops down shortly below the tower, that is the cut—what is shown on this map as the original surface?

A. The solid line with the cross hatching next to it represents the surface as it now is. This dash

(Testimony of W. B. Hargraves.)

line represents the surface as it was previous to the slide, as near as could be determined now.

Q. And the piece that lies between the dotted line and the solid line represents the pieces that slid? A. Material that was moved, yes.

Q. What was the depth of the material that was moved right above the cut behind the Koski house?

A. About four feet.

Q. About 4 feet deep—what was its depth up about the tower?

A. Oh, it ran up to probably 10 or 12 feet there.

Q. Where was this cross-section made with reference to the slide area—how far from the Bach house line? [434]

A. Oh, I can show on the map where that cross-section was taken.

Q. All right, come down here and show it on the map.

A. Along the line that I have drawn there.

Q. It would be a short distance below the Bach house line? A. Yes.

Q. And if the Koski excavation were higher at the Bach house side it would probably be a little higher than you have indicated? A. Yes.

Q. And the slide mass, how would the thickness of the slide mass compare there—be about the same? A. About the same.

Q. Now, directing your attention to another blue-print here, I will ask you what that is a blue-print of?

A. That represents a cross-section of the slide

(Testimony of W. B. Hargraves.)

that took place on our property over near the stamp mill.

Q. That is the slide that shows on your map as being a short distance to the north of the stamp-mill? A. Yes, sir.

Mr. HELLENTHAL.—I offer that in evidence.

Mr. RODEN.—No objection.

(Whereupon said cross-section was received in evidence and marked Defendant's Exhibit No. 7.)

Q. Are those maps on the same scale, Mr. Hargraves?

A. They are, Mr. Hellenthal, on the same scale.

Q. Now, does that Exhibit No. 7 show the cut that was made there? A. Yes.

Q. What was the depth of that cut?

A. Oh, that is about 25 feet, I should say.

Q. Now, what was the depth of the slide at the point of the cut?

A. About 5 feet—5 or 6 feet.

Q. What was the depth of the slide further up?

A. It is 10 feet above. [435]

Q. On that line also the solid line represents the ground as it now is, and the dotted line represents the original surface?

A. The same convention there as on the other one, yes.

Q. Both maps are made in the same manner?

A. Yes, sir.

Q. Now, Mr. Hargraves, is there any way that a geologist can determine whether a slide was caused by a cut—by an excavation, or whether it

(Testimony of W. B. Hargraves.)

was caused by a saturation of the ground to such an extent that the ground became mushy from the water?

A. Tell by the character of the break in the ground where the slide took place.

Q. That can be determined, then?

A. Can tell by looking at it, very easily.

Q. How were these slides that are shown upon the cross-sections of those two blue-prints that have been introduced in evidence—how were they produced—what was the cause of them?

A. I would say they were caused by cuts.

Q. Why do you say they were caused by cuts?

A. Because of the character of the break in the ground above there. The slide area around the edge of the slide broke as a single mass or whole mass.

Q. How can slides be caused—by what different causes?

A. Oh, they can be caused by making a cut, by disturbing the angle of rest that any material has.

Q. No matter how that is done?

A. No matter how it is done.

Q. Whether it is done by a tree falling over and making a hole, or a rock slipping out, or any other cause, it would be the same, is that right?

A. Yes, sir.

Q. Can a solid mass, such as you said this was when it was moved, can that be moved in any other way except a disturbance at the foot of it? [436]

A. No, there must have been some disturbance

(Testimony of W. B. Hargraves.)

at the bottom of the mass in order to have it slide. That disturbance may not have taken place right immediately previous to the time of the slide—it may have taken place a long time before, or just immediately before—the question of time is quite variable.

Q. But there must have been some kind of a place for it to slide to, is that the idea?

A. Yes, sir.

Q. How is this soil deposited on the hillsides?

A. Deposited by the action of gravity on the hillside of the rocks and weathered material up above, laid down in layers, and has its natural angle of repose—clay and weathered off angular fragments slide down the hill until they reach the angle of repose.

Q. What do you mean by angle of repose?

A. The angle of repose of any material is the natural slope that it takes when it is piled up anywhere,—that is, it is the natural slope of the surface of any material when it is piled up in a pile.

Q. It is the angle to which it will slide and at which point it will quit sliding, is that the idea?

A. That is exactly it, yes, sir.

Q. That is the angle of repose. Now, where a slide is created on a hillside—originally there is no slide on the hillsides, is there, Mr. Hargraves?

A. No.

Q. The hillsides are slopes of barren rock?

A. Barren rock.

(Testimony of W. B. Hargraves.)

Q. And the soil is deposited afterwards—where does that soil come from?

A. Comes from the upper portion of the hillside—the weathering of the rocks.

Q. The weathering of the rocks—the action of the elements up on the rocks? [437]

A. Yes, sir; admixture of air and water and frost.

Q. That causes the rock to break off and disintegrate and form soil? A. Yes, sir.

Q. What character of rock is it that underlies these mountains?

A. Along there it is greenstone.

Q. Is the greenstone there in massive form?

A. No, not what you would call massive—it is—

Q. Greenstone originally is a massive rock, isn't it? A. Yes.

Q. And the hillside here, what is it—is it formed of schist or is it still massive?

A. It is schisto character.

Q. By schisto character what do you mean—what is the rock when it becomes schist?

A. Rock which becomes schist is one which has been subjected to considerable pressure—pressure enough to—not change the chemical character of the rock to any extent but changes the structural character of the rock—it makes the crystals of the minerals that compose it lay in parallel directions—that is, those crystals lay in the same direction.

Q. Makes them lay in layers?

A. In layers.

(Testimony of W. B. Hargraves.) .

Q. Gives the rock the appearance of slate to some extent? A. Yes.

Q. Slate is formed how?

A. Slate is a fine grained sedimentary rock which is formed by the laying down of fine material in the ocean or lake bed and then that is cemented by pressure and heat.

Q. And that is laid that way, one layer on top of the other? A. On top of the other.

Q. And this greenstone, because of this pressure you speak of, takes on that appearance, is that right?

A. That is it. The difference between slate and schist rock, [438] as far as looking at it is concerned, it is about the same; but the schist is what we call a plutonic rock—that is, it has not been laid down by the weathering agencies that we have on the surface of the earth, whereas slate is composed of material that is weathered off—it has no crystalline form like the plutonic rocks have, but their physical character is very similar.

Q. Greenstone is originally sort of a volcanic flow, is it not? A. Yes, sir.

Q. And slate is generally down at the bottom of the water? A. Yes.

Q. And that is the character of rock that this hill-side is composed of, is that right? A. Yes, sir.

Q. Where that rock disintegrates—breaks up and forms soil, what kind of soil does it form?

A. The biggest part of it is clay, and of course that is mixed with angular fragments of rock which

(Testimony of W. B. Hargraves.)

have been broken off and weathered down to the size of clay—consistency of clay.

Q. And with that is mixed, I suppose, as time goes on, some of the decayed vegetation that falls on the mountain-side? A. Oh, yes.

Q. Now, Mr. Hargraves, how do you determine that these slides that you speak of there were caused by excavations at the foot and not by an admixture of water that went to the extent of causing a flood at the surface?

A. If it was due to a flood you would not have the break in the ground—the character of the slide—the cross-section would be different. You would have the same effect as taking a sand pile and taking a shovel and shoveling away from the bottom of the sand below—it would simply flow off gradually—it would not break away to any extent. You see in a sand pile there would be no cohesion among the particles—each particle would be free from the rest—but here it moves as one mass.
[439]

Q. What does this curved condition indicate with reference to that?

A. That simply shows that it did not have that flow—that a flood would not be the cause of it. If that admixture had been enough to cause a flood you would have had a section like this—instead of having any cut up here to amount to anything it would come down to more of a triangle there.

Q. What is it that the geologists term that curve?

(Testimony of W. B. Hargraves.)

A. Some of them call it a variation of the elastic curve, as laid down by Dr. Becker.

Q. Now, I wish you would explain that elastic curve to the jury—just what that indicates, why it indicates it, what it does indicate—that elastic curve is present in both of these cases, is it not, Mr. Hargraves?

A. There is evidence of it, yes—it is modified by local conditions.

Q. The elastic curve, however, its general form is present in both of these slides?

A. It is present anywhere where a cut is made in the bank.

Q. It is present anywhere where a cut is made in a bank, is that true? A. That is true.

Q. Is the elastic curve present if a slide occurs and is not due to a cut or excavation in the bank?

A. No, there is no elastic curve present unless you have a cut. The elastic curve is a line of tension and is present if no slide has occurred. Where there is a cut in the hillside the line of tension is there, although the slide may not have taken place yet.

Q. The moment a cut is made a tension sets up?

A. A tension sets up—there is a line of tension that stretches back to any point along the face of the cut. There are an infinite number of those lines of tension. [440]

Q. And when a slide occurs where does the slide occur with reference to that line of tension?

A. It occurs along that line of tension—one of

(Testimony of W. B. Hargraves.)

those lines of tension—one where the strength of the material is not enough to overcome the force.

Q. Now, then, what does the presence of the elastic curve show with reference to the cause of the slide?

A. It shows that there was a cut there—I didn't quite get that, Mr. Hellenthal.

Q. What does the presence of the elastic curve indicate with reference to the cause of the slide itself—does it show the cause of the slide?

A. It would indicate there was a cut there that caused the slide, yes, sir.

Q. It indicates there was a cut there and the slide was caused by the cut? A. Yes.

Q. By cut you mean any removal of the soil material at the bottom of the slide?

A. At the bottom of the slide, yes.

Q. Whether made by Koski or the Alaska Juneau Company or by a falling tree, or by any other cause? A. Yes.

Q. Any case where there was an excavation at the lower end of the slide mass, is that true?

A. Yes, sir.

Q. Now, Mr. Hargraves, if you have before you, as an engineer and geologist, a condition where the depth and angle of the cut is known, the angle of the hill behind it as well as the bed-rock conditions are known, the character of the soil and the moisture contained in it are determined by experiments, can you determine mathematically in advance where the slide will occur when it does

(Testimony of W. B. Hargraves.)

occur? A. It can be done, yes, sir. [441]

Q. If you had before you the evidence of the Koski cut, before this slide had happened, as well as the data concerning the bedrock above there, the character of the soil, and matters of that kind which I have indicated, on the slope of the hill, could you sit down before that slide happened and show just exactly where it would happen?

A. Well, I have never tried it but I think I could. I know it can be done.

Q. You know it can be done? A. Yes, sir.

Q. And a cross-sectional drawing could be made before the slide happened showing the conditions upon the ground as you now have indicated them after the slide?

A. If you knew all the factors, yes; it could be done.

Q. Just the same as they can foretell an eclipse of the sun, or some of the other—

A. Not with that degree of accuracy, because some of those factors could not be determined with that degree of accuracy.

Q. The mathematical work of it is just as accurate, is that not so?

A. Yes, sir; that has been proven.

Q. Simply the application of the law of gravitation. Now, Mr. Hargraves, when a cut is made in a hillside—a steep hillside, when an excavation is made, what is the immediate effect of it—what happens with reference to the mass lying above it?

(Testimony of W. B. Hargraves.)

A. The mass lying above it may slide at any time.

Q. What happens?

A. The action of gravity, while it is acting on that mass at all times, it has a chance to work now because one of the supports of that mass has been taken away—the main support of it.

Q. And that action commences at once upon the making of the cut? A. Yes.

Q. Now, what is the action, or how does the pull of gravity work—in one direction, two directions, or more directions, upon a [442] mass like that?

A. You make a cut, and any point on the face of the cut—take a point like this at this place, the pull this way out into the cut, the stress on it that way, is due to the product of the density and the depth—the product of the cut at that time—and the stress in this way sets up the line of tension, which is the elastic curve, and it comes to the surface along that mathematical curve—it has been demonstrated.

Q. That has been fully demonstrated more especially in the Panama Canal slides?

A. Yes. The strength of the material at any one of these points is less than the tendency of the cut to slide, and it slides at that point. That is the simplest way of explaining it.

Q. How do these slides come—do they come rapidly or slowly? A. They start very slowly.

Q. In a mass like that, even after it moves so

(Testimony of W. B. Hargraves.)

that it could be determined by delicate instruments that it was moving, how long would it then be before it would come down—before it would precipitate itself down the hillside? I am not asking you to tell me in hours or minutes, but relatively speaking would it take a long or a short time?

A. It would be a comparatively long time—it would be a matter of hours rather than a matter of minutes, I should say.

Q. Now, where a cut is made in a hillside of that character and no bulkhead is put in to hold the mass in place, what will the inevitable result be, if any?

A. It will move out sometime if that condition arises—the strength of the material is less than the tendency to move it out due to its weight and the depth of the cut.

Q. And whenever that happens it is coming down?

A. It is going to come down then, yes.

Q. Sooner or later it will come, is that the idea?

A. When that condition is set up.

Q. That condition will sooner or later occur, will it not? [443]

A. Yes, sir; depends on the material—in rock it would take a long while.

Q. Even if it were solid rock it would happen, would it not? A. Yes, sir.

Q. Solid rock would take a long time while loose material would take a short time, is that right?

(Testimony of W. B. Hargraves.)

A. Yes, sir; in loose material—loose material would not have that character, any way.

Q. I am speaking of soil—I do not mean sand, but soil—that is right, isn't it?

A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Now, Mr. Hargraves, you say that this dirt would move rather slowly—that is, it would be a matter of hours rather than of minutes?

A. Yes, sir.

Q. And if this tower was situated where it is shown in this case, the tower was located in the slide mass, wasn't it? A. Yes, sir.

Q. That would move very slowly then, too, wouldn't it?

A. It would move slowly to start with, yes.

Q. And the wires would vibrate very slowly indeed, wouldn't they?

A. Oh, no; the vibration of the wires has nothing to do with the movement of the tower.

Q. Do you mean to say if this is the tower here and I jerk it this way that the wires would not move any?

A. You can demonstrate that.

Q. Answer yes or no—would the wires move the same?

A. No, they would not move the same.

Q. No, of course not. And if the wires would part between the two towers that parting would

(Testimony of W. B. Hargraves.)

not be caused, certainly, by a rather slow movement, would it? [444]

A. I don't understand what you mean by parting, Mr. Roden.

Q. Breaking. A. Breaking?

Q. Yes.

A. Would be caused by them moving slowly?

Q. Yes.

A. If it moved far enough they would probably break, no matter whether it moved slow or fast.

Q. A sudden break would not occur, though, the wires would stretch and then become taut—they would have to become taut before they could break, wouldn't they?

A. Yes, but you would have a vibration of those wires.

Q. And the more taut they became the less vibration there would be? A. No.

Q. But the size of the vibration would become very much less? A. Oh, no.

Q. Do you want to tell me as a scientist, now, Mr. Hargraves—you are a learned man—that the more taut a wire becomes the larger the vibration gets?

A. You are talking about this condition here?

Q. I am talking about conditions generally now.

A. What kind of wire do you refer to?

Q. Any kind of a wire. You know what is meant by the wave of vibrations, don't you?

A. Yes, sir.

Q. All right. Now, let's take a practical exam-

(Testimony of W. B. Hargraves.)

ple. You have seen steel wires on a violin, haven't you? A. Yes.

Q. Are you acquainted with the strings of the violin? A. Some.

Q. You know the E string on the violin, do you?

A. No, I don't.

Q. By stretching the bow across it it gives the highest sound. When a man tunes up his violin he tightens up the strings [445] to make the strings give a higher pitch, doesn't he? A. Yes.

Q. And the more he tightens them up the larger will be the vibrations of those strings, isn't that true?

A. I don't know whether they would be larger or smaller.

Q. When he touches that string with his bow or finger it vibrates, doesn't it—that is what causes the sound? A. Sure.

Q. And the higher the sound the greater the number of vibrations of that string, isn't that true?

A. I think so, if I remember rightly. It is a long time ago that I had that.

Q. The organ that shakes the college or the church, it has long deep notes which vibrate slowly, but the wave vibrations are very large and throw it around the building, and that is the cause of the windows rattling, isn't it?

A. Doesn't the length of the string and the length of the bow have something to do with the noise?

Q. And the high notes, they don't make the windows rattle, do they?

(Testimony of W. B. Hargraves.)

A. I couldn't say that—I don't know.

Q. The vibrations in the high strings—you know the number of vibrations in those lower notes, practically speaking? You have studied sound, haven't you—you have attended a technical school?

A. Yes, but I say that was a long while ago.

Q. You remember when you went to school that that string on that instrument, the sound before it becomes a sound, must have at least 18 vibrations per second—do you remember that?

A. No, I don't remember that.

Q. Well, then, the higher the sound gets the more vibrations? A. I think that is so.

Q. And the sound waves get very much smaller but they are much more frequent, isn't that true? You have seen the charts of sound, haven't you, when you were at school? A. Yes. [446]

Q. Where they have those waves, and where they show those deep low notes? A. One long wave.

Q. And the same thing applies to a wire, doesn't it? A. Sure.

Q. So the vibrations, the greater the tension, the more the wire becomes stretched, the greater the number of vibrations but the size of the vibrations becomes very small, isn't that true?

A. That may be true.

Q. Sure. So if these wires break here, or the tower was torn out of its position and the strain had come on it the vibrations would be comparatively short but rapid?

A. Not on that length of wire.

(Testimony of W. B. Hargraves.)

Q. Not on that length of wire—the length hasn't anything to do with it, has it? A. Sure.

Q. How could the length make any difference?

A. Because that wire has got a sag in it, which would have a big vibration in that.

Q. But when you stretch that to the breaking point there is not much sag left then, is there?

A. There isn't much left then.

Q. There isn't any, practically speaking, is there?

A. All right—there isn't any.

Q. There couldn't be any because it couldn't break if there was a sag in it?

A. Oh, yes; you cannot stretch a wire absolutely horizontal—there is always a sag there.

Q. You stretch it before you break it. Now, then, you want to tell this Court and jury, do you, Mr. Hargraves, that you can sit down now and I will tell you the cut behind somebody's buildings here in town, and that you can tell them exactly where the slide is going to happen?

A. I didn't say I could sit down now and do it; but I could do it [447] if you would give me all the factors in it.

Q. How long since you investigated this cut up where the slide happened?

A. The first time I was up there, the 7th of January, 1920.

Q. And the last time?

A. I was up there yesterday for the last time.

Q. There is quite a cut there now, isn't there?

A. Quite a cut, yes.

(Testimony of W. B. Hargraves.)

Q. How deep is that cut?

A. I should say 8 to 10 feet.

O. Is that all? A. I think so; yes.

Q. All right. The elastic curve is present there, too, isn't it? A. Yes, sir.

Q. Where is that going to break the next time?

A. That depends on the factors in the case. The material is not homogenous and you cannot tell—

Q. That cut is here, now, practically speaking, isn't it?

Q. Yes, that is where the ground is broken away.

Q. Yes, and it stands up there quite steep now, doesn't it? A. Yes.

Q. And the elastic curve is present?

A. Yes, sir; from there back.

Q. Can you give the jury any idea where it is going to break the next time?

A. I can give an idea on the cross-section here.

Q. All right, let's see where that is going to break the next time.

A. If it breaks it will break down like that.

Q. And if it breaks further off, the whole works will come down, off here, wouldn't they?

A. If it breaks back far enough.

Q. Eventually they will, sure. Is that why all these works here were moved, to prevent the elastic curve from having any effect on them? [448]

A. No, sir.

Q. That isn't the same there now as it was on

(Testimony of W. B. Hargraves.)

the 2d of January, is it—that is, the places are not the same? A. No, sir.

Q. When was the change made?

A. It was made in 1920.

Q. Well, the slide was in 1920, too?

A. That was made subsequent to the slide.

Q. And where are these works located now that were up here?

A. The pipe-line starts here and comes to here, like that.

Q. Where is the trommel located now?

A. The trommel isn't there any more.

Q. Don't use any?

A. No, sir; use a flat screen.

Q. You use a flat screen now?

A. Yes—several of them.

Q. And the discharge from the penstock—

A. We haven't any penstock now, Mr. Roden.

Q. Haven't any penstock now any more? This map is as it was on January 2, 1920, Mr. Hargraves, is it? A. Yes, sir; I think so.

Q. You are positive about that?

A. As far as I know. I didn't make it on the 2d of January so I couldn't say.

Q. No, but you tried your best to get things as they were on the 2d day of January?

A. Yes, sir.

Q. Was the Kyander house laying down here on the 2d day of January?

A. That I couldn't tell you—it was there on the 31st of May, when I platted it in.

(Testimony of W. B. Hargraves.)

Q. But I am asking you—you are trying to get things as nearly as you can, the way they existed on the 2d of January. A. Yes, sir. [449]

Q. Do you know whether on the 2d day of January the Kyander house wasn't down here?

A. I don't know—I think it was down there.

Q. From the way it looks. You told us on your direct examination that this house was up against the bridge, didn't you? A. Yes.

Q. It had been shoved down? A. Yes.

Q. It was shoved down by the slide, wasn't it?

A. Yes.

Q. Why didn't you put it where it was on the 2d day of January?

A. Because that is still there—the Koski house is not there.

Q. There are a lot of other things still there that you put on—the Bach house is where it was?

A. The Bach house is where it was.

Q. It wouldn't be in the slide, would it, because the Koski house occupied the whole slide?

A. The Kyander house was there.

Q. Inside of the slide area?

A. It was in front of the slide area.

Q. It moved itself down?

A. No, the Koski house took it down.

Q. It walked down?

A. If it had been moved by the slide it would have demolished the house—if the slide had been behind it.

Q. This pipe-line here, you say that is open—

(Testimony of W. B. Hargraves.)

did you say that? A. Yes, sir.

Q. What does this represent down here on this pipe-line—what is that?

A. That is a 20-inch valve.

Q. That is in the pipe-line, isn't it?

A. Yes, sir.

Q. What is it put in there for?

A. To shut off the water when it is to be shut off.

[450]

Q. Then you don't know, as a matter of fact, whether the pipe-line was open or not?

A. No—it was supposed to be open—it was chained and locked.

Q. You don't know that it was open—you are guessing at it?

A. It is like a good many of these things—I don't know them personally, I know them—

Q. You have seen a good many cuts on these sidehills within the limits we are talking about, within the city of Juneau, haven't you?

A. I have seen some of them, yes, sir.

Q. Do you know how big this cut is that the Alaska Juneau has behind the administration building—do you know how long that is?

A. About the length of the administration building.

Q. How long is that? A. About 125 feet.

Q. How high does that cut extend up?

A. About 10 feet. That cut has a retaining wall in itself.

Q. That cut has a retaining wall in itself?

(Testimony of W. B. Hargraves.)

A. Yes, sir.

Q. Where the Koski cut did not? A. No.

Q. Is there anything put in here to make it act as a retaining wall?

A. The material has sloughed down there and holds that up.

Q. Is there anything back behind the administration building to act as a retaining wall?

A. It acts as its own retaining wall.

Q. I am asking you if there is anything behind the administration building to act as a retaining wall? Answer that yes or no.

A. There is no space between that and the hillside.

Q. There is no space?

A. Yes, sir—there is no space.

Q. Do you want to tell this Court and jury that there is no space between where that cut is back of the administration [451] building and the hill?

A. At the top of the wall there is, but the top of the wall is way above the sidehill.

Q. How much is the top of the wall above the hillside? A. Quite a bit above it.

Q. Is it? A. Yes, sir.

Q. You are as positive of that as you are of everything else, are you? A. Yes.

Q. You better go down there and take a look again. A. All right.

Q. The elastic curve is present there, too, isn't it?

A. Yes.

(Testimony of W. B. Hargraves.)

Q. Where is that slide going to happen?

A. The administration building supports it.

Q. Here is the sidehill back of the administration building, here comes your wall and your administration building straight up, now this cut here is a protection to the administration building, is it?

A. No, the administration building keeps that hillside from coming in there.

Q. It does? A. Certainly.

Q. Then why didn't the Koski building?

A. The Koski building was a little bit away from the cut.

Q. But the administration building is plumb up against it, is it? A. It is now, yes.

Q. Are you acquainted with the cut behind the hospital back there?

A. No, I am not, Mr. Roden.

Q. You have pretty good eyesight, haven't you?

A. Yes, sir.

Q. Come over here and take a look—do you see the cut back there? A. Yes, sir. [452]

Q. Is that up against the building, too?

A. No, it looks like it was this side of the building.

Q. Isn't it right back of the building?

A. I don't know.

Q. Don't quibble about it—you can see it is behind the building, isn't it?

A. All right, it is behind the building.

Q. And the elastic curve is present too, isn't it?

A. Yes, sir.

(Testimony of W. B. Hargraves.)

Q. Where is that going to break off up there?

A. I have an idea about how far it would go back to.

Q. Where? A. Back of the building.

Q. How far back?

A. Depends on the character of the ground and the slope of the hill.

Q. There are a good many places in the same condition on the hillside.

A. They must have retaining walls or something like that behind them.

Q. The hospital hasn't one, has it?

A. No; they are taking quite a chance.

Q. Are you acquainted with the Russell house up on the hill? A. No, I am not.

Q. Come here and see it. They dug into the hill where they put their foundation? A. Yes, sure.

Q. And the elastic curve was present there, too?

A. Wherever you make a cut it is present.

Q. Wasn't that the cause of this slide?

A. It might be a contributing cause.

Q. That would be the fault of the Alaska Juneau Gold Mining Company then. Do you want us to understand, Mr. Hargraves, that you or any human being on earth could tell where a slide would come as definitely as an astronomer can foretell the occurrence [453] of an eclipse?

A. No, I said I could not.

Q. Let me finish—where those sidehills are going to leak after a man makes a little cut in the bank?

A. No, you cannot unless you know all the fac-

(Testimony of W. B. Hargraves.)

tors, and a man cannot know all the factors.

Q. Then you want to modify the answer you made on your direct examination?

A. What answer did I make?

Q. You cannot tell us that, by working with a piece of paper and pencil, the same as an astronomer can foretell an eclipse of the moon?

A. Certainly you can if you know all the factors the same as the astronomer knows about the eclipse of the moon.

Q. You went up there on the 7th day of January, that was five days after the slide?

A. Five days after the slide.

Q. You didn't see any evidence of any abrasions or cutting by the water at all, did you, above the slide, and you went over it carefully, didn't you?

A. I went over it, I won't say how carefully.

Q. You went there for the very purpose of making an investigation?

A. No; when I went up there I went up with Mr. Pond when he took the pictures—that was the main reason I went up—with Mr. Pond to take the pictures.

Q. You told him where to take the pictures?

A. I suggested the places to take the pictures.

Q. Sure, you suggested the places to take the the pictures naturally, and you didn't see any wearing of the water along here, from the top of the slide to the penstock?

A. The trail was clean, that was all.

Q. I mean when I am talking about the trail—

(Testimony of W. B. Hargraves.)

you couldn't have been on the trail all the time,—as a matter of fact if you went from here up to there, the trail doesn't reach up anywhere [454] from here to the top of the slide—you went over the head of the slide to the penstock and you didn't see any wear on the trail?

A. Wear on the trail?

Q. Yes.

A. Only the ordinary wear on the trail caused from walking on it.

Q. You didn't see any considerable cutting right in here, did you, cutting in the ground right at the head of the slide? A. No.

Q. You would have seen that, too, if it had been there, wouldn't you?

A. I would have seen it if it was there.

Q. Now, that penstock, do I understand you to say that it cannot overflow?

A. Yes, the penstock cannot overflow—the screen can.

Q. The screen can overflow? A. Yes, sir.

Q. Where is the screen with reference to this penstock building?

A. The screen is in the penstock building—it is on top of the penstock.

Q. The screen is part of the penstock itself—inside of the penstock, isn't it?

A. No, it is on top of the penstock.

Q. That penstock was about 12 feet high, wasn't it? A. Yes.

Q. And on top of it was a screen? A. Yes.

(Testimony of W. B. Hargraves.)

Q. On top of the roof?

A. No, not on top of the roof. What we call a penstock proper is the lower part,—it really isn't a penstock, either.

Q. The screen is in the penstock building, is it?

A. Exactly.

Q. And when the screen overflows the water comes out of the penstock, doesn't it? [455]

A. No, it comes out of the screen.

Q. It comes out of the penstock building, doesn't it, Mr. Hargraves?

A. Yes, it comes out of the penstock building.

Q. We will say, to understand each other, that the penstock building overflowed.

A. The penstock building did not overflow. The water overflowed the screen, out of that building.

Q. All right, the water came out of the penstock building. A. Yes, under certain conditions.

Q. And it did, didn't it?

A. So I have been told.

Q. This water out of this penstock couldn't possibly go anywhere else except down here, what you have called the natural drainage?

A. Oh, no, I think, as I said this morning—it came the other way on that morning.

Q. On this occasion the water took another course?

A. The conditions that existed made it go that way—it wouldn't take but very little to divert it—ice or snow.

Q. According to your contour lines it would be

(Testimony of W. B. Hargraves.)

impossible for this water to come over the hill wouldn't it? A. Oh, no.

Q. These contours here are all high points, aren't they? A. It came here and on down here.

Q. Then how did it go? A. Right in here.

Q. And it didn't follow the natural drainage at all?

A. It didn't follow the drainage it generally had before, no.

Q. And according to your contour lines it couldn't get there, could it?

A. It could get there if there was any debris or ice and snow there.

Q. In other words, it would run in the highest places if the ice and snow made it go there, is that the idea.

A. Sure—it would go anywhere if there was anything to make it go. [456]

Q. But the other natural conditions would prevent it from going there?

A. Generally goes the other way—that is all I know about it.

Q. It didn't on this day, did it? A. No.

Q. Was that the only day it didn't go the other way? A. I couldn't say that.

Q. Now, Mr. Hargraves, where a cut is made in a sidehill such as we have been talking about, where is the weak point—where is the pressure the greatest?

A. The greatest pressure is at the bottom of the cut.

(Testimony of W. B. Hargraves.)

Q. For instance it would be here?

A. Yes, sir.

Q. And that is where it was with this slide here?

A. Yes.

Q. And that is where it began to move?

A. Not necessarily at the bottom of the cut; no.

Q. It wouldn't move at the strong point, would it?

A. There is a pressure all the way down—all points along the depth of the cut. It will move when that pressure overcomes the strength of the material. If the material is stronger there at the bottom it don't break there.

Q. I am not very scientifically trained, Mr. Hargraves, but still I know that a thing usually breaks at its weakest point, don't it?

A. At its weakest point, yes, sir.

Q. And so under all natural conditions this slide mass would break away at the weakest point in its area?

A. The weakest point, yes.

Q. And that would be at the foot?

A. Not necessarily at the foot, no.

Q. But that is the weakest point, isn't it?

A. That isn't the weakest point.

Q. Didn't you tell me a moment ago that the weakest point was at [457] the foot of the cut.

A. No, I said the greatest strain was at the foot of the cut.

Q. That is where the weakest point is, isn't it?

A. Not necessarily.

Q. If it is of the same strength it would break there?

A. If it was homogenous, yes.

(Testimony of W. B. Hargraves.)

Q. In other words, if I put a beam across here, the weakest point would be where—in the center?

A. The beam has the same strain throughout. If you put a load on it, that is where it would probably break.

Q. The beam would break in the center?

A. If the beam was homogenous—

Q. If the beam was rotten it would break in the weak point? A. Yes.

Q. But I am talking about a good beam—that sidehill is about the same all over, isn't it?

A. No.

Q. What is the difference?

A. Those sidehills have been deposited throughout a great length of time and at different times. There are different layers of material—some a lot coarser, some a lot finer—it is not homogenous at all.

Q. Oh, you want the Court and jury and everybody else to understand that this little cut down here was the cause of that slide?

A. In my opinion it was, Mr. Roden.

Q. Might have been?

A. In my opinion it was the cause of the slide.

Q. You have heard the testimony in this case pretty well, haven't you, Mr. Hargraves?

A. I haven't heard any in this case, no, sir.

Q. Well, the fact that the ground broke away down here above the tower wouldn't prove anything to you at all, would it, with reference to the cut here—the cut would still be the cause of it? [458]

(Testimony of W. B. Hargraves.)

A. Certainly—that is where you would see the first movement, would be up at the cut.

Q. Have you ever seen a cut in your life that caved in? A. The bank caved in.

Q. That didn't cave in right at its bank—right at its face? A. Certainly, it will cave anywhere.

Q. Certainly, invariably.

A. That is a different action than this case here.

Q. That is the way it is at your administration building, now, isn't it—the dirt breaks off and breaks off? A. Certainly.

Q. And if there is a little snowslide up a couple of thousand feet I suppose this little cut causes that snowslide? A. No, I didn't say that.

Q. You say this pipe-line can carry twice as much water as the flume?

A. As the ditch in No. 3 tunnel, yes, sir.

Q. What about the ditch in other places?

A. The flume beyond No. 3 tunnel can carry more water than that if it is in good shape.

Q. Then a big flume would carry a big volume of water further up towards the source, and then it begins to get smaller as they begin to get near the place where they need to use it, is that the idea?

A. No; there is only so much water can flow through that ditch through No. 3 tunnel, regardless of what the volume was up at the other end.

Q. What was the idea of putting in such a big pipe?

A. The pipe will take care of our water for some time if we enlarge the tunnel.

(Testimony of W. B. Hargraves.)

Q. The flume will take care of that water, too, for a long time? A. Yes.

Q. Would you call that a good engineering job to put in a pipe-line that will carry more water than you have got? [459]

A. I wasn't here when that was put in.

Q. How long have you been here?

A. I have been working for the company since the fall of 1918.

Q. Would you consider it good engineering to put in an extensive pipe-line carrying twice as much water as you can possibly get into it?

A. Not under ordinary conditions; no.

Q. That soil up on the hill is pretty nearly all clay? A. Large portions of it is clay.

Q. And broken rock?

A. Small fragments of rock.

Q. That is what all those trees grow in, that clay and broken up rock? A. Grow in that, yes.

Q. Trees grow very fine in clay, don't they?

A. They grow in that character of soil.

Q. I am talking about clay—I am not talking about character of soil—I am asking you if trees will grow in clay?

A. I'm sure I couldn't tell you—maybe not.

Q. You know, don't you, that they do not grow in clay? A. Maybe they don't—I couldn't tell you.

Q. Nothing grows in clay, does it?

A. I don't see why not?

Q. Have you ever seen a clay field that anybody can grow anything on?

(Testimony of W. B. Hargraves.)

A. Yes; I have seen a clay field in Northern Ontario hundred of miles wide and hundreds of miles long with a growth of years on it.

Q. Yes, loam—that is the same here as you saw in Northern Ontario—you find big trees growing here now, don't you? A. Yes.

Q. Stumps 3 feet thick, and they grow in clay and rock. Isn't it a fact that the vegetation and material that you find down there now is what is sometimes called leaf mold? [460]

A. Certainly—leaf mold on top.

Q. That is soil, isn't it?

A. Soil may be termed that, too.

Q. It is loam.

A. Loam might be called leaf mold.

Q. It isn't clay, is it?

A. No, I don't call loam clay.

Q. Is that hillside shattered in through there, or is it solid?

A. I don't quite get what you mean, Mr. Roden.

Q. The formation, is it even, or are there interstices, as they are called—openings—any of them present there?

A. Present up where bedrock shows.

Q. Interstices in there? A. Yes.

Q. They are always, so to speak, on the bedrock?

A. How is that?

Q. These openings, these interstices, are always on the bedrock?

A. Not necessarily always—they may break along

(Testimony of W. B. Hargraves.)

the joint planes of the rock—they may not always—they may cross each other.

Q. They may cross each other, yes—what causes that? A. A movement has taken place.

Q. Yes, a movement has taken place—that is what I want. Now, you made all your examinations for the preparation of this plat, when?

A. I made the main part of them in the end of May and middle of June.

Q. 1920? A. 1920.

Q. And the pictures you took on the 7th day of January?

A. 7th day of January—I didn't take them—Mr. Pond took them.

Q. He took them in your presence?

A. He took them in my presence, yes, sir.

Q. They were taken at your instance, were they? [461] A. Not at my instance.

Q. They were taken at the instance of the company, but you were acting for the company?

A. Yes; I merely went along to show him the way.

Q. Do you remember the climatic conditions as they existed on the 2d day of January and the day or two before, that is with reference to rain and snow—did it rain any on that day?

A. The 2d of January?

Q. Yes.

A. I know in the morning of the first day of January it was raining pretty hard, and snowing some.

Q. How was it on the second, do you remember?

A. On the second I was not here.

(Testimony of W. B. Hargraves.)

Q. You were out of town then? A. Yes, sir.

Q. Did the same condition continue for several days up to the time you took the pictures?

A. I don't know; I either came back on the 4th or the 5th, and as I remember it—I know the time we took the pictures it was raining quite hard.

Q. How was it in comparison with the rain on the first of January—about the same?

A. I think it was a heavier rain.

Q. Much heavier or just a little heavier?

A. All I know about the 1st of January is, as I say, early in the morning, going down the bay—I went out on a boat.

Q. On the 1st it didn't rain any harder than you have seen it rain here lots of times, did it?

A. Oh, I don't think so, no; it was a pretty hard rain—around the 7th it was an extra heavy rain.

Q. And that is when you took those pictures?

A. Yes, sir.

Q. You came back on the 4th, did you?

A. It was either the evening of the 4th or the evening of the [462] 5th, I don't know which.

Q. On ordinary rains those snowsheds don't throw much water, do they? A. No.

Q. But when it rains heavily they throw a little water? A. Yes, quite a little water.

Q. This was taken on the 7th day of January?

A. It was.

Q. And it was raining pretty heavily, wasn't it?

A. It was.

Q. It wasn't raining extraordinarily heavy at that

(Testimony of W. B. Hargraves.)

time? A. I would say it was a pretty heavy rain.

Q. You wouldn't say it was raining extraordinarily heavy? A. It was raining—

Q. Don't know that on the 7th day of January we had the biggest rainfall we have had in the town of Juneau in twenty years save and except on the 26th of September, 1918, when the flood occurred down on Gold Creek?

A. I don't know that, but it may be so.

Q. But it was an extraordinarily heavy rain when you took those pictures?

A. It was a very heavy rain when we took those pictures.

Q. And this picture here, Defendant's Exhibit 5, shows the water coming over the snowsheds, doesn't it? A. Yes.

Q. That was taken the 7th day of January?

A. That was at the same time.

Q. And you think that that is the way it would look to a man standing down on the Pacific Coast dock if he saw any water come over there; is that it?

A. That is where the picture was taken—from the Pacific Coast dock.

Q. All right—that is the way it showed on January 7th?

A. That is the way it showed on January 7th.
[463]

Q. During a heavy rain. All right. Now, if on January 2d it was just a day of ordinary rain the snowsheds would practically throw no water, would

(Testimony of W. B. Hargraves.)

they? A. It depends on other conditions.

Q. What are the other conditions?

A. If it was a time of melting snow that would have some effect on it.

Q. Oh, yes, but under ordinary conditions it wouldn't show much water, would it?

A. If there was no snow there it wouldn't show a great deal of water.

Q. And the way it looks to you in that picture, do you want to tell us that a man seeing water coming out of that penstock on the 2d day of January would probably be mistaken and that he probably saw the water coming over the snowsheds over here instead of over there?

A. No, I didn't say that, Mr. Roden.

Q. No, but what is the purpose—what did you take this picture for?

A. To show the water coming over the snowsheds—to show the slide, that is what that picture was taken for.

Q. What was this picture taken for?

A. That was to show water coming over the snowshed.

Q. And every one of them was taken to show that these people were probably mistaken?

A. That is up to you—that part of it.

Q. So the man himself who helped build the penstock might have seen the water coming out over the snowsheds and really believed it was coming out of the penstock?

(Testimony of W. B. Hargraves.)

A. I don't see how he could if he built the penstock and knew where it was.

Mr. HELLENTHAL.—I object to that question because there is no evidence that anybody who helped build the penstock saw any water. [464]

The COURT.—It is argumentative, Mr. Roden.

Mr. RODEN.—All right. That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. You know that no man could look up there and see the water from the penstock flow towards him if he was on Front Street or on the Pacific Coast dock or anywhere along there, could he?

A. No, sir—couldn't see it flowing towards him.

Q. There would be no water flowing towards him, whether it was Jim Larson or anybody else?

A. No.

Q. Now, Mr. Hargraves, just a question about the oscillation of those wires. How would that pull come if it were standing in a slide area, if a landslide started?

Mr. RODEN.—I object to that; he has already gone into that.

The COURT.—What is the point you want to rebut?

Mr. HELLENTHAL.—Mr. Roden has been asking about stretching and tightening the wires, and how that would affect the oscillation of the wires, and Mr. Hargraves told Mr. Roden that that had nothing to do with conditions here on the hillside—

(Testimony of W. B. Hargraves.)

the stretching of the wires was not a parallel case with this situation. I am asking Mr. Hargraves to explain just what he meant—to tell the jury what he meant.

Mr. RODEN.—He stated on direct examination that the wires would stretch, and I wanted to show on his cross-examination that they would stretch and when, and that if the slack were out they could not vibrate so far.

The COURT.—He may answer the question and you may cross-examine him again.

A. The wires oscillate.

Q. I don't think you have got my question, Mr. Hargraves. When Mr. Roden was examining you you said there was a difference between the matter that he was interrogating you about [465] and this case—about the tightening and stretching of the wires, and the vibrations—I want you to explain to the jury fully why, and what you mean by it.

A. The slide would not move all at once—probably came in a series due to the uneven character of the ground—probably moved in a series of jumps.

Q. Jerks?

A. Jerks, and that would move the tower and give the wires a chance to vibrate; each time the tower would move with the ground that oscillation would be set up—the magnitude of the oscillation I don't know anything about.

Mr. HELLENTHAL.—Your Honor, I intended to introduce this picture with the witness on direct examination, but overlooked it and I would like to

(Testimony of W. B. Hargraves.)

put it in now. Do you know what that picture is, Mr. Hargraves? A. Yes, sir.

Q. What does that represent?

A. That represents the hillside before the slide.

Q. The houses on there marked Koski house, Larson house, and other houses, who marked those?

A. I marked the houses.

Q. And the houses marked are the houses referred to in this trial by the names indicated on the picture? A. Yes, sir.

Q. Does the picture show the area from which the slide occurred?

A. Yes, approximately so, as near as you could put it on a photograph.

Q. And that is indicated how?

A. By this heavy line here.

Mr. HELLENTHAL.—I offer that picture in evidence.

Mr. RODEN.—I want to ask him a question or two about it first.

The COURT.—You mean as preliminary, or are you cross-examining him now?

Mr. RODEN.—All right—let him introduce it—I have no objection. [466]

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 8.)

Q. That is the same picture as the small picture which has been introduced?

A. Yes, it is an enlargement of that picture.

Mr. HELLENTHAL.—That is all.

(Testimony of W. B. Hargraves.)

Recross-examination.

(By Mr. RODEN.)

Q. According to this picture, Mr. Hargraves, the slide moved from left to right?

A. The picture was taken from that side of the slide area—taken from over here.

Q. Well, then, it doesn't really show how the slide occurred, or the slide area, with reference to the Koski house?

A. Why, yes, as near as I could put it on there, Mr. Roden.

Q. Did you look at it sideways, look at it from this way, or did you stand right in front?

A. If the picture were taken right in front it would look different.

Q. As a matter of fact if a man looked at this picture from the front, the slide would be here, wouldn't it?

A. No, if you looked from the front you would look from over here, and you would be looking right straight up at it. This picture is taken from the side.

Q. This is the gulch, isn't it, that we have spoken about? A. Yes.

Q. That is the gulch this side of the house?

A. Yes.

Q. And that gulch is this side of the buildings?

A. Yes.

Q. I mean this side of the Koski building?

A. Yes; right at this corner.

Q. Didn't the slide material move into the gulch?

(Testimony of W. B. Hargraves.)

A. I don't think it did. [467]

Q. It is lying in the gulch now, isn't it?

A. I heard testimony in the other case—I don't think it does—it came practically straight down, I think.

Q. But there is slide material in the gulch now, isn't there?

A. Below where it broke away from here?

Q. Yes, right here, below the Koski house—lying in the gulch now, isn't it? A. Part of it.

Q. The way you have it here you take it away from the gulch.

A. Oh, no, the gulch comes in behind there too.

Q. You want to tell us that the gulch came behind the Koski house? A. Came at this corner of it.

Q. It didn't come within 15 feet of the Koski house, did it? A. What point of the gulch?

Q. The gulch itself.

A. I think it did, as near as I can find out.

Q. Came within a few feet?

A. Within a few feet—right near that corner of the Koski house.

Q. Five or 10 feet?

A. Somewhere around there.

Q. All right. Now, the way this picture looks the slide comes from up here, about west on the mountain-side, comes from the left and goes to the right, is that it? That is the way the picture shows it.

A. That is the way it would look if you took a

(Testimony of W. B. Hargraves.)

picture from that same point now. I see that line there.

Q. That is what that picture shows?

A. That picture don't show that—it shows it on that picture.

Q. The way that you have marked it, it came from the left and went to the right.

A. On the picture, yes.

Q. When in truth it came from the right and went to the left, didn't it? [468]

A. Not on the picture.

Q. I am not talking about the picture—I am talking about how the slide came.

A. You can tell by looking at the plan.

Q. Did it come from right to left?

A. It came straight down there from behind the Koski house.

Mr. RODEN.—All right, that is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Why does that picture show the slide to be where it is?

A. Because that is where it will show—you mean my line on there?

Q. Yes.

A. Because that is approximately where the line of the slide is now.

Q. Where the line of the slide is, but why does that discrepancy occur that Mr. Roden has been talking about?

(Testimony of W. B. Hargraves.)

A. Due to the point where the picture was taken.

Q. Due to where the camera stood? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [469]

Testimony of P. R. Bradley, for Defendant.

P. R. BRADLEY, called as a witness on behalf of the defendant, having been previously duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is— A. P. R. Bradley.

Q. Where do you reside?

A. Treadwell, Alaska.

Q. Do you know the Alaska Juneau Gold Mining Company, the defendant in this case? A. I do.

Q. What connection do you have with that company? A. I am general superintendent.

Q. Were you acting as such—how long have you been acting as such, Mr. Bradley?

A. Since the 1st of September, 1914.

Q. And you were so acting when this slide occurred? A. I was.

Q. What is your profession, Mr. Bradley?

A. I am a mining engineer.

Q. As a mining engineer have you also studied engineering geology? A. I have.

Q. You have a knowledge of engineering geology as well as mining engineering? A. I have.

Q. How long have you followed your profession

(Testimony of P. R. Bradley.)

both as a mining engineer and a geologist?

A. Twenty-five years.

Q. What countries have you followed it in?

A. Oh, California, Mexico, South America, Canada, Alaska, Australia and other places.

Q. In California, Mexico, Canada, Alaska, South America, Australia—where else? [470]

A. Nicaragua.

Q. Where else?

A. Oh, a number of different states in the United States.

Q. Have you also been in various parts of Asia and Europe in connection with mining examinations and things of that kind, in connection with your line of business?

A. No, I haven't been in Asia, nor have I been in Europe in connection with mining examinations.

Q. What part of Europe have you been in in that connection?

A. I haven't been in Europe in connection with mine examinations.

Q. Your European experience was not in connection with mining examinations. Now, Mr. Bradley, you are familiar with conditions around the slope of Mount Roberts? A. I am.

Q. And are familiar with the works of the Alaska Juneau? A. I am.

Q. Familiar with the flume and penstock that have been referred to in this case? A. I am.

Q. And the various other things referred to?

A. Yes.

(Testimony of P. R. Bradley.)

Q. Do you know when that penstock was built?

A. Why, I think the penstock was built in the fall of 1916.

Q. Under whose direction and supervision was it built?

A. Under my general direction and supervision.

Q. Who devised the plan for its construction—that is, in a general way? A. I did.

Q. And determined upon its location?

A. I did.

Q. Now, prior to that time how was the water conveyed?

A. Prior to the time of the construction of that penstock the water was conveyed to the 50-stamp mill around the hillside where the tram line appears in a flume that ran along with the tram line. [471]

Q. The penstock that was in use then—

A. Well, there was no penstock—the only thing that served as a penstock was a tank that the flume spilled into at the mill.

Q. And the water was taken from that?

A. The mill water was taken from that and the surplus went into the tailings.

Q. And in 1915 you made a change?

A. In 1916 we made a change.

Q. And that change resulted in the construction of the penstock which is shown upon Exhibit No. 2?

A. Yes.

Q. How did you happen to select that place, Mr. Bradley,—I want to ask you a question or two first

(Testimony of P. R. Bradley.)

before I ask you that. That water is taken from Gold Creek? A. Yes, sir.

Q. And is utilized and used by your company in connection with its mining and mill operations on the channel? A. Yes.

Q. Now, answer the other question that I asked you, please.

A. Well, originally the flume line that extended from what is called there "the old portal" to the 50-stamp mill carried water to the 50-stamp mill, but at that time the tram line which extended around the hillside to the 50-stamp mill was only a temporary line, and when we constructed the 8,000-ton mill we built a more substantial and double track line from what is now called the new portal to the 8,000-ton mill. Well, in doing that we had to abandon the old flume which ran along with the temporary track; then we were confronted with the question of finding means to get the water from the old portal of No. 3 tunnel to the 8,000-ton mill; and after a good deal of consideration it was decided to carry it over from that portal to the new mill in a 30-inch pipe-line, which would deliver the water to the mill tank, as is designated on the map, and the order was placed with some firm in Portland, I [472] believe, for that pipe; but in the meantime the city of Juneau was anxious to secure a connection with our salt-water system—

Mr. RODEN.—I don't see any purpose of giving a history of what every man wanted or contemplated doing—the question was what was done.

(Testimony of P. R. Bradley.)

The COURT.—I do not see, Mr. Hellenthal—

Mr. HELLENTHAL.—Just explaining why that system was put there the way it is.

The COURT.—Explaining it—he goes back to the year one in explaining it.

Mr. HELLENTHAL.—We are several years from the year one, your Honor. We are explaining why that 30-inch pipe is in there—it only takes a moment.

The COURT.—The 30-inch pipe was reduced to a 24-inch pipe a little later on. It don't make any difference why it was done or when it was done—that was the condition as it existed. Proceed.

Q. Go ahead, Mr. Bradley.

A. The city was anxious to secure connection with our salt-water system which extended from the power-house to the mill tank, and arrangements were made whereby under certain considerations we were to construct that line. That line had to be below the mill tank—the line we had contemplated was above the mill tank, and if we had put both of those lines in we would have had duplicate lines along that hillside; so the two lines were combined in one line, and that developed the necessity of having a line below the mill tank along the hillside to a point near the administration building, and that also developed the necessity of carrying this line up the hill to some point where we could get the water from the No. 3 tunnel in to that pipeline; and after a good deal of consideration and deliberation it appeared that this was the only safe

(Testimony of P. R. Bradley.)

place to put the pipe-line. We would have desired to put it straight up [473] here so as to go right into the portal of the tunnel and obviate the necessity of any construction on the hillside, but the ground conditions did not permit of this, and this seemed to be the only place where we could put the pipe-line in and get it buried, and that pipe-line determined the situation of the penstock. That is how the penstock happened to be at that point.

Q. Go ahead in your own way and finish.

A. I believe that answers the question.

Q. Then the penstock was built?

A. Then the penstock was built at that point.

Q. How was the penstock constructed?

A. Well, the penstock was a box-like affair with the botton constructed so that the pipes would enter into it at right angles to the angle of the pipe. The lowest pipe was a 4-inch pipe going to the power plant; the next pipe was the 8-inch pipe of the city line; and the third pipe was the 30-inch pipe which carried the water to the mill.

Q. Is that 30-inch pipe a 30-inch pipe all the way?

A. No; it goes down the hill here, and then it is reduced to 24 inches, and that again is reduced to 20 inches.

Q. Is there any valve in that pipe?

A. When we laid out the pipe-line we considered the whole situation there and we determined that we had quite a stretch of pipe along the hillside with a number of city valves in it, and we realized

(Testimony of P. R. Bradley.)

there might be occasions arise when we would want to make use of that pipe for repairs or changes or alterations or additions for the city fire department, so in order to make that possible without shutting down the mill we put in a valve at the mill.

Q. What other contrivance do you have to get water to the mill besides this fresh water?

A. We have two salt-water pumps in the powerhouse.

Q. These pump the water from where to where?
[474]

A. Those pump the water from Gastineau channel to the mill tank.

Q. Those supply water when the fresh water isn't available; is that right? A. That is true.

Q. What devices did you have in the mill, if any, to inform those in the mill of a shortage of water in the tank—at the time of the slide, I mean, January, 1920?

A. At the time of the slide there were some lighting arrangements on the outside of the tank which would signal whether or not the tank was full; and also there was an arrangement whereby a bell rang on the ball mill floor in case the water got to a point, 3 feet, I think, below the overflow point.

Q. If the water got 3 feet below the overflow point the bell rang on the ball mill floor? A. Yes.

Q. And what lights flashed,—do you know anything about that—what colored lights?

A. There were colored lights—my recollection

(Testimony of P. R. Bradley.)

of these things is not distinct—simply know they had that system.

Q. Know they had the system but don't recollect just exactly how it was carried out? A. No.

Q. That has since been changed? A. Yes.

Q. And what was the purpose of installing that system,—what necessity exists for having a steady flow of water in the mill?

A. There are two necessities. In the first place there are a great many operations in the mill that depend for their success upon a uniform flow of water. That is one necessity. And another necessity was that the tailings flume, after we got it into operation, was not of sufficient grade to carry the tailings away without the tailings flow being diluted with a sufficient quantity of water. Besides that it is used for direct milling purposes. [475]

Q. If anything should happen to the flume at any point between the mill tank and the intake, how would those lights act and the alarm act in the mill? A. Between which points?

Q. Anywhere—anywhere along the flume, if the flume should break or any other thing occur.

A. In case there should be anything of that character occur that would interfere with the water in the mill, these automatic arrangements would operate.

Q. Immediately give the alarm?

A. Yes, sir; and furthermore the overflow at the tank would cease, and at that time that was easily visible from the mill superintendent's office.

(Testimony of P. R. Bradley.)

Q. What is the condition of the water of Gold Creek, as to whether it is muddy or clear or otherwise, generally speaking?

A. Generally speaking, the water of Gold Creek is clear water.

Q. Are there times in the year when there is any moss or leaves or other debris in the water?

A. Oh, yes; at times of sudden freshets; in the fall after the leaves have been dropping, a freshet will pick up an unusual number of things of that character.

Q. Now, in connection with your operations in the mill is there any necessity for having the water clear?

A. Oh, yes; sometimes we are using water on the concentrating tables where the amount required is just what will come through a valve; and if we were to allow all this foreign material to come into the pipe-line we would have all these valves clogged.

Q. Have to keep it clean?

A. Yes, have to keep it clean.

Q. What did you do at the penstock when you first installed it with a view to keeping the water clear, if anything?

A. There was a flat screen put in there.

Q. How long did you have that in there?

A. I don't recall just how long that was in. [476]

Q. I mean approximately how long—a year or two?

A. Oh, I don't know—I don't think it was that long.

(Testimony of P. R. Bradley.)

Q. It wasn't two years?

A. No, I don't think so.

Q. What did you find with reference to the moss and debris that came down the creek, as to how it acted on the flat screen?

A. Oh, well, that device was unsatisfactory.

Q. You found it was unsatisfactory. Why was it unsatisfactory?

A. Well, in order to work satisfactorily the meshes had to be large and that would let fine material get into the pipe-line, and in order to keep that out the meshes had to be small, and you couldn't have much success with a flat screen and small meshes.

Q. There were times when the small meshes would clog up; is that the idea? A. Yes.

Q. Ordinarily, with the ordinary flow of water did you have any difficulty with the flat screen, when there was no freshet?

A. No, not under ordinary conditions.

Q. It was only in time of freshet that the flat screen would not take care of the water?

A. Under extraordinary conditions.

Q. What did you do when you found out that the flat screen was not satisfactory?

A. The problem of putting something in there that would be more automatic in its character was discussed, and it resulted in the installation of this trommel screen, which is the usual device—the device commonly used in places of that character.

Q. What kind of a device is a trommel screen?

(Testimony of P. R. Bradley.)

I wish you would explain that to the jury so they will understand clearly what it is. Just a minute—the first screen you had was just a mere flat screen put over the top; is that right? A. Yes, sir.

Q. And this trommel screen differs from that screen in what effect? [477]

A. It isn't flat, in the first place. This trommel was about 4 feet in diameter at one end and about 3 feet in diameter at the other, and about 8 feet long, and the surface was what I think they call No. 6 mesh screen—that is a screen with openings approximately an eighth of an inch square; and that was installed on top of the penstock, and the water from the flume came in the one end and fell through the openings in the screen, and at the same time the trommel was constantly revolving, so any foreign matter in there would gradually work toward the far end and be discharged.

Q. What did you do in the way of installing any device to discharge the moss, leaves, or whatever might be taken out of the water—discharge that on the outside of the penstock?

A. Well, there was a small spout put there so as to carry it away from the penstock—carry it away from the end of the trommel so it would not back up,

Q. Now, was that spout designed to carry water?

A. No, it was not designed to carry water because according to our calculations there would be no water for it to carry.

Q. What was it designed to carry?

(Testimony of P. R. Bradley.)

A. Designed to carry the brush and rubbish that was screened out of the water.

Q. Now, as soon as that screen was in operation was there any chance for water to overflow the spout? A. No.

Q. If the screen stood still under ordinary conditions, when the water was not charged with an unusual quantity of debris, would there be any chance of the water running over the spout?

A. No, not under ordinary conditions.

Q. When did the unusual conditions occur when it was necessary to keep the screen in motion?

A. Oh, the unusual conditions occur generally after heavy freshets—more particularly in the fall of the year.

Q. Fall and spring? [478]

A. Yes, and the spring, too, when the water is beginning to flow.

Q. How is that trommel screen kept in motion?

A. Kept in motion by an electric motor.

Q. What kind of electric system have you got here, Mr. Bradley?

A. We have both hydro electric and steam electric systems.

Q. Where is your power generated?

A. The power which is used at the Alaska Juneau plant is generated at Nugget Creek, at Douglas Island, at Sheep Creek, and in the absence of sufficient hydro electric power we also have a steam electric plant on the beach, where it shows on the map as "power-house"; and in addition we are

(Testimony of P. R. Bradley.)

also connected with the electric power system of the Alaska Gastineau Company.

Q. You have, then, four sources of power of your own, Nugget Creek, Sheep Creek, Douglas Island and the power plant of the Alaska Juneau?

A. Yes.

Q. And aside from that you are connected with the Gastineau Company so that you can get power from them in emergency cases?

A. We not only get power from them in emergency cases, but the last two winters we have gotten a great deal of power from them in a commercial manner.

Q. How does electric power compare with other forms of power as to reliability?

A. I think that modern electrical engineering has made electrical power about as reliable as power can be made.

Q. The most reliable form of power known, is it not, for general distribution? A. I think it is.

Q. How does your power compare with electric power generally as to reliability?

A. I would say that we were particularly well fitted as to reliability because of the numerous units that we have. Any [479] one of them could go out and we would still have power.

Q. Now, did you build any flume or box or pipeline to carry water from that spout at the penstock to Portal Gulch or some other place?

A. No, we did not.

Q. Why didn't you?

(Testimony of P. R. Bradley.)

A. Because there would be no water to carry.

Q. No occasion for it?

A. No; the design of the pipe-line was such that there could not be any water to carry—that was particularly gone into when the matter was first laid out.

Q. I wish you would explain that fully to the jury.

A. Well, at the time it was decided to build that pipe-line from the penstock to the mill by way of the administration building, the size was calculated to be sufficient to take more water than we could get into the penstock simply because we had an open end of that pipe into the storage tank at the mill and the regulating tank at the mill; and the flow was supposed to be continuous through No. 3 tunnel and through the penstock and through the pipe, and in order to insure its continuity we made plenty of provision that there would be capacity enough in that pipe-line.

Q. Why did you install such a big pipe?

A. Well, the pipe-line is not only installed for our maximum needs, but also to insure that all the water we could get through the No. 3 tunnel would get to the mill, where we need it.

Q. Do you know what the relative carrying capacity of the ditch in No. 3 tunnel and the pipe-line is, approximately?

A. Oh, the pipe-line is a little more than twice the capacity of the ditch.

Q. Now, the flume line itself, how does that com-

(Testimony of P. R. Bradley.)

pare with the ditch,—how does the wooden flume compare with the pipe?

A. The wooden flume, if it were in perfect order, would carry [480] about the same as the pipe.

Q. How did you happen to build the ditch smaller than the wooden flume?

A. The first tunnel that was built there was a single track tunnel and the ditch was right in the bottom of the tunnel, the full width. Subsequently we widened that tunnel and made it a double track tunnel, and while the widening process was going on we were running the 50-stamp mill, and for that reason it didn't seem expedient at that time to make any alterations in the ditch. We couldn't widen the tunnel under traffic and alter the ditch too,—and furthermore, at that time there was no necessity for it.

Q. The intention being that ultimately you would make the ditch as large as the flume, is that right?

A. That is a thing that can always be done if it becomes necessary.

Q. And when that is done it will have about the same capacity as the pipe leading from the penstock to the mill—is that right? A. Yes.

Q. You are familiar with the drainage system up there—the way the thing drains at the spout—the penstock?

A. I am familiar with the slope of the ground there, yes.

Q. Which way does it naturally drain?

A. Well, the natural drainage from the point

(Testimony of P. R. Bradley.)

where water that might flow over that spout hits the ground is down the line there marked "natural drainage." The only time I ever saw the water spilling over there, I traced it down and it went right down there.

Q. It would run there unless there were ice or snow or some other thing to impede its course?

A. There would have to be some condition that did not exist at that time to change its course.

Q. Could any flume or pipe-line or anything of that character, [481] built from the spout to Portal Gulch, serve any purpose at all?

A. No—no purpose for it to serve.

Q. It would be more apt to clog it up and fill it up with sand and leaves than the natural drainage channel, wouldn't it?

A. Yes; that is what would happen unless something closed were used, and then it might fill up with debris.

Q. Was there any reason to expect that thing to overflow at any time?

A. No, we had no reason to expect it to overflow—we had every reason to expect it not to overflow there—we thought we had taken all the precautions that could be taken against overflow.

Q. The installation of that trommel screen, what was that in the way of a precaution against that?

A. Well, that I think was the highest degree of precaution. A flat screen would have served the purpose but it was not automatic—and a flat screen is the customary screen; but a trommel screen is

(Testimony of P. R. Bradley.)

automatic, and as long as the trommel screen operates you have every assurance that it will clean itself and be in working shape.

The COURT.—Right there, Mr. Bradley, I want to ask you a question. What would take care of the debris that would clog up a flat screen,—what would take care of that?

A. That would have to be taken care of by hand from time to time.

Q. A flat screen is set on a slight angle so that some of it cleaned itself of its own accord?

A. Yes, but it would have to be taken care of by hand.

Q. You found that there were times when there were freshets and the water was charged with leaves and debris that it would require too much attention? A. Require too much attention, yes.

Q. Now, is that trommel screen and penstock still in existence? A. No, they are not.

Q. When did you move them?

A. We moved them last year. [482]

Q. What time of the year?

A. Oh, some time through the summer, we started the work; it was completed along towards fall.

Q. At that time did you move the change house?

A. Yes, moved the change-house at the same time.

Q. And the flume? A. And the flume.

Q. Did you leave anything in that vicinity at all?

A. We didn't leave anything that is shown on that map. Of course we had to put in something to get the water from the portal of the tunnel to

(Testimony of P. R. Bradley.)

the pipe-line,—the original pipe-line is still in the position as shown on the map.

Q. None of the buildings or other structures that are now shown on the map are in position now?

A. Didn't leave the penstock nor the flume nor the change house—the snowsheds are still there.

Q. Why did you make that change?

A. At the time I came here the change house was there,—I had nothing to do with that, and at the time I put in the penstock where it is, it seemed at that time to be the right thing to do; but in the summer of 1918, when my brother came up here, we went over that place together and he became fearful of the character of the hillside further up, and he didn't like so much structure to be in the open—he was afraid something might happen there that would get us into trouble with somebody down below, and he consented to the expense of making the change, and at that time we were making estimates of the amount of money it would require to do certain items of work around the place, under a definite allowance we are working under—and we were allowed to make that change.

Q. At that time you were busy making a good many changes?

A. Yes, we made a good many changes—made changes in the mill—

Q. And those changes changed your program to what extent?

(Testimony of P. R. Bradley.)

A. Changed the program calling for half a million dollars. [483]

Q. Your program called for half a million dollars worth of changes? A. Yes.

Q. And this was part of it? A. Yes.

Q. How much was appropriated for this purpose? A. \$25,000.00.

Q. That was when? A. That was in 1918.

Q. What was done pursuant to that, afterwards?

A. I didn't do anything for sometime because there were many things in the mill that had to be changed in order to get the property where we thought it would be on a proper producing basis. That was the primary object of the whole change, and the one of greatest importance. I didn't do anything on this job until the year 1920. In the spring of 1920 we had accumulated quite a considerable waste dump just right here northwest of the 50-stamp mill, in about here; and after we had got that place pretty well filled up with waste it developed that we had crushed the pipe, and we promptly went on salt water and we were on salt water until along toward the end of 1920.

The minute the pipe was crushed and the whole system rendered useless, and no fresh water coming at all, why, then there would be no interruption to any operations by starting to make the change, and the change was started at that time.

Q. Previous to that time had your annual reports shown that the change was contemplated?

A. Yes.

(Testimony of P. R. Bradley.)

Q. Your annual report for what year?

A. For the year 1918.

Q. Your annual report for the year 1918 showed that you intended to make that change at that point? A. Yes.

Q. For the reasons you have indicated?

A. Yes. [484]

Q. Was any mention made of it in your annual report for 1919?

Mr. RODEN.—We object to this—we are back to the old story—we are getting the life of the Alaska Juneau.

The COURT.—Objection sustained.

Q. Now, proceed, Mr. Bradley; what did you do in the spring of 1920 with reference to this matter?

A. Why, I took the matter up with my brother and he advised me not to make any changes there if there was any chance that it could possibly be construed as a voluntary admission that—

Mr. RODEN.—We object to that.

The COURT.—You have answered his question. Ask another question, Mr. Hellenthal.

Mr. RODEN.—He always tells what his brother directed him to do—let him say what was done.

The COURT.—I told Mr. Hellenthal to ask him another question, Mr. Roden.

Mr. RODEN.—I beg your pardon—I didn't hear the ruling of the Court.

Q. What did your brother direct you in connection with this matter at that time—your brother is the directing head of this concern, isn't he?

(Testimony of P. R. Bradley.)

A. Yes.

Q. President of it.

A. He directed me not to—

Mr. RODEN.—We object to what his brother directed him to.

The COURT.—Of course that is immaterial what his brother directed him to do. What was done—what did he do?

Mr. HELLENTHAL.—Your Honor, Mr. F. W. Bradley is the directing head of this concern—Mr. P. R. Bradley does not do anything without his direction. I want to show why he did it, how he came to do it, and for what reason.

The COURT.—Aren't you quibbling over something that does not amount to much? I am ruling on this, not so much that it either helps or hurts, but I am ruling to save time. I do [485] not think the question is asked right, and I do not think the objection amounts to anything. I want to make some progress in the case—get down to something that counts.

The COURT.—Did you do that your brother told you to?

The WITNESS.—No.

The COURT.—Then it does not make any difference what your brother told you to do about it.

Mr. HELLENTHAL.—It might, your Honor.

The COURT.—What difference would it make what his brother told him to do if he did not do it?

Mr. HELLENTHAL.—I don't want to be put in the light of stating matters before the jury that

(Testimony of P. R. Bradley.)

are not evidence. If the Court wants me to I will tell the story that I am trying to prove by this witness. Mr. F. W. Bradley wrote to Mr. P. R. Bradley and told him the change they contemplated in former years should be made but he said, "In view of the fact that this slide occurred there, I want you to consult Mr. Hellenthal to see if it might be construed as a voluntary admission on our part that we were liable." Mr. Bradley came to see me and advised with me, and I asked him if he thought that there was any danger that anybody felt that they were responsible any longer, and he said if they made the changes they might; and I told him under those circumstances not to make the change. Then when I was away a big rock came down from the top of the mountain, about the time Mr. Dudley was there, and conditions began to look worse there—there is a big chunk of dirt that is still hanging over the side of the mountain that may come down any minute. That rock called Mr. Bradley's attention to the situation, and he went up there and investigated the conditions; and in order to notify the people of the town of the dangerous condition he took Mayor Robertson up there with him and showed him that it was dangerous to keep any structures under it. After showing that situation to Mr. Robertson, he went to work and made [486] the changes, just the time the pipe-line broke down there, and that his delay in making the changes was simply due to the expression of my views to him at the time.

(Testimony of P. R. Bradley.)

The COURT.—Objection sustained.

Q. What did you do, Mr. Bradley?

The COURT.—What did you do—not what your brother told you to do.

Mr. HELLENTHAL.—We will take an exception to the ruling of the Court.

Q. What did you do in 1920?

A. In 1920 we moved the penstock, change house and flume, and connected that portal of the tunnel with the end of the 30-inch pipe-line with a steel pipe, which we put in a trench as close to the hill as possible, so in case there would be any slide at any time it would come over it rather than disturb it.

Q. Why did you make that change?

A. On account of the character of the country above there, and on account of the fact that the stuff evidently started to move.

Q. I want you to explain to the jury just what the character of the country above there was, and what induced you, or precipitated the making of this change.

A. The character of the country up there is extremely precipitous—extremely rugged. There are a number of large logs up there, and a great many boulders—huge boulders that seem to be standing without any support; and it is only a matter of time before frost or the elements are going to push those things out of there. The more I look at that country the less I like it. It is an extremely bad place—it is a place where slides have come down

(Testimony of P. R. Bradley.)

because the bedrock is all scoured slick.

Q. What is the condition with reference to a chunk of dirt that is hanging out there now, up above where the penstock and change room stood?

A. I don't know the condition of any particular chunk, but there are a large number up there that are not safe.

Q. This is the matter that your brother referred to in 1918? [487] A. Yes, sir.

Q. Was there any other reason why your brother wanted to move those structures in 1918?

A. That was all—because of the danger that existed above, and the trouble we might get into with people below in case there was a slide there that would do any damage.

Q. That ground above there on which this slide material comes, is that on your property or above your property?

A. Above our property—we have no control over that.

Q. What happened in 1920 that precipitated the making of this change? I mean in the way of a slide at that point.

A. There was a large boulder came down there—just missed the change house, just missed the flume—that was a boulder two or three feet in diameter, I suppose. I don't know where it came from, but it came right down by there, and just missed doing damage.

Q. That was just about the time Mr. Dudley was up there, wasn't it? A. I believe it was.

(Testimony of P. R. Bradley.)

Q. He saw it, didn't he? A. I believe he did.

Q. And shortly after that what else happened?

A. We found that the pipe-line was crushed.

Q. The pipe-line being crushed could you use that pipe? A. No.

Q. What did that have to do with making the change at that time?

A. That pipe-line was out of commission and if we made the change at that time we would not be holding up anything that depended on that pipe-line because it was out of service anyhow.

Q. And the change was made? A. It was.

Q. Now, how did you change it—what did you do—what is the difference up there now?

A. We brought the water out straight through the tunnel—through the portal, and just inside here somewhere—I don't know the [488] distance—we put in some stationary screens, slightly inclined toward the flow; then we brought the water from there out in a flume and the flume follows, as close as we could get it, to the bank underneath these snowsheds. Prior to that time the flume was visible from town—it was right out in front of these snowsheds. Now, it is put in as close to the bank as we can get it—brought in around here—dug a little excavation to get it in closer to the bank. I think the flume terminates just about this point; and from there the water goes into a large steel pipe 30 inches in diameter, and is carried by a long steep elbow into the 30-inch pipe, and also the 8-inch and 4-inch pipes, and carried around through the

(Testimony of P. R. Bradley.)

same long switch into the end of the flume.

Q. How is that flume with reference to the hill-side, and with reference to slides from above?

A. We not only carried it in so that there would be a sharp bedrock bank above it along the hill-side, so that in case anything came down it would jump over it, but we also buried it.

Q. So that a slide coming down from above would not affect it? A. No, I don't think it would.

Q. What did you do with the change house—did you leave that where it was?

Mr. RODEN.—I think I will object to the question. It is all subsequent changes made, and it is all a waste of time.

The COURT.—I do not understand what time you are referring to about the changes having been made.

Mr. HELLENTHAL.—They were made since the slide. The purpose of it is to show why these changes were made. I want to show that it wasn't done because of this slide, but it was done for other reasons.

The COURT.—Wouldn't one general question cover that? Were any changes made by you on account of this slide having occurred? Then if Mr. Roden wants to controvert it he may do so on cross-examination. One general question and one answer would [489] settle the whole thing.

Mr. HELLENTHAL.—I offer to prove why they were made.

The COURT.—You can prove why they were

(Testimony of P. R. Bradley.)

made by just simply asking the question whether any of them were made on account of this slide. You have developed the fact that changes have been made.

Mr. HELLENTHAL.—All right—I will ask this question: Did you move the change house at the same time? A. We did.

Q. Did you leave anything under that loose material—any kind of a structure at all—change house, flume, or anything else? A. No.

Q. Moved everything—where did you move the change house to? A. Inside of the tunnel.

Q. A solid rock change-room, is that right?

A. Yes.

Q. Now, did you take any steps to notify the people of Juneau of the dangerous condition that existed there?

Mr. RODEN.—We object to that, if your Honor please.

The COURT.—You mean did you take any steps after these changes were made?

Mr. HELLENTHAL.—The time the changes were made?

The COURT.—The changes were made after the slide?

Mr. HELLENTHAL.—Yes.

The COURT.—And now you ask him if he took any steps to notify the people of Juneau—

Mr. HELLENTHAL.—I will state this—it doesn't make much difference—but if a man sitting on the jury, or you sitting there or I sitting here,

(Testimony of P. R. Bradley.)

hear Mr. Bradley telling about the dangerous condition of that mountain, knowing there are people living underneath, we would say, if Mr. Bradley made the changes to protect his own property why didn't he do something to protect the other property down below. If counsel objects to it, all right.
[490]

The COURT.—The objection is sustained.

Q. Now, Mr. Bradley, did you examine that slide area after the slide?

A. Yes; I examined it first, I think, on the 5th of January.

Q. What year? A. 1920.

Q. Where were you at the time of the slide?

A. I was in Seattle.

Q. You were on your way from San Francisco to Juneau? A. Yes.

Q. You were not here when the slide happened?

A. No.

Q. Upon your arrival on the 5th what did you do in the way of examining the slide area?

A. That is the first thing I did after I got here.

Q. What did you find in the slide area in the way of running water, if anything?

A. Oh, there were bedrock—I think two bedrock streams running out.

Q. Two bedrock streams—where were they running?

A. They were running from, I should say, a point underneath the letter "D" in "slide"—somewhere along there—and went over toward the letter "S."

(Testimony of P. R. Bradley.)

Q. Went in the neighborhood of the letter "D" and in the neighborhood of the letter "S"?

A. Yes.

Q. In the word "slide" in "slide area"?

A. That is about my recollection. One wasn't such a noticeable stream—the one under the letter "D" was the larger stream.

Q. How large was that?

A. Well, I don't know just how to measure that—that was a stream perhaps an inch deep and it might be 3 or 4 inches wide.

(Whereupon court adjourned until to-morrow morning at 10 A. M.) [491]

MORNING SESSION.

March 29, 1921, 10 A. M.

Mr. HELLENTHAL.—If your Honor please, I have a couple of witnesses who wish to go—they are from the "Redondo," and with the Court's permission I will put them on now and then finish with Mr. Bradley?

The COURT.—Very well.

Testimony of Charles Carlson, for Defendant.

CHARLES CARLSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Charles Carlson.

(Testimony of Charles Carlson.)

Q. You are on the "Redondo"? A. Yes sir,

Q. And she is going to sail in a few minutes?

A. Yes, sir.

Q. Were you here at the time of the slide, on January 2, 1920? A. Yes.

Q. Did you notice the slide at that time?

A. After it slid.

Q. After it slid you saw it?

A. After it slid.

Q. I direct your attention to a picture here—do you observe the place where the slide broke loose at that time? A. I do, yes, sir.

Q. When you first saw it? A. Yes.

Q. That was how long after the buildings had slid?

A. Might have been two or three minutes.

Q. Immediately afterwards? [492]

A. Yes, sir.

Q. Was there any water running over that part of the slide when you noticed it first?

A. We were lying at the old Pacific Coast coal-bunker and I couldn't see whether there was any water or not.

Q. From where you were could you see any water at that point?

A. No, sir, I couldn't see no water because we were so far away, but I know there was water running down afterwards.

Q. But when you first looked did you see any water? A. No.

Mr. HELLENTHAL.—You may cross-examine.

(Testimony of Charles Carlson.)

Cross-examination.

(By Mr. RODEN.)

Q. You don't know whether there was any water or not, Mr. Carlson—it was too far to see?

A. It was too far to see.

Mr. RODEN.—That's all.

Q. (By Mr. HELLENTHAL.) You saw it afterwards?

A. I went up to the slide afterwards and that is when I saw it.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [493]

Testimony of R. P. Lovely, for Defendant.

R. P. LOVELY, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. P. R. Lovely.

Q. You are on the "Redondo"? A. Yes, sir.

Q. Were you on the "Redondo" when she was in port at the time of the slide, the 2d of January?

A. Yes.

Q. At that time did you observe the hillside?

A. I did.

Q. Before the slide happened that morning did you see a stream of water coming from the flume?

A. Yes.

(Testimony of R. P. Lovely.)

Q. Look at that picture and point out to the jury where that stream was.

A. The stream was on this side.

Q. The same stream as shows on that picture?

A. Yes.

Q. Which way was that stream running—towards you or away from you? A. Towards me.

Q. Before the slide happened did you see any other stream coming from the flume?

A. Yes; there was a stream on the right—on the far side from me.

Q. Before the slide? A. Yes, before the slide.

Q. On the right? A. On the right side.

Q. That is the one you have just pointed to?

A. Yes. [494]

Q. On picture, exhibit No. 4, does that show the stream you saw before the slide?

A. No, this doesn't show the stream before the slide.

Q. Up in the upper corner here—this is an enlargement of that same picture—look at it a little more closely. A. Yes, it is this stream here.

Q. Right in the upper right-hand corner of the picture. A. On the right-hand side.

Q. After the slide happened—did you see the slide?

A. I didn't—you mean when it actually occurred?

Q. Yes.

A. I heard the noise on the boat and turned around and looked.

Q. After it happened did you see any other

(Testimony of R. P. Lovely.)

streams of water coming from the flume?

A. Yes, I saw a stream afterwards.

Q. Where was that stream?

A. That was more in this direction.

Q. In what direction did that spout?

A. Well, it came down towards the main street, down the side of the hill.

Q. When you were looking at it how were you looking at it, on the edge of it or on the face of it?

A. We were a good deal on the side of it—we were at the old Pacific Coast bunkers.

Q. And from where you were you were looking into the side of it? A. Yes.

Q. You heard the noise and saw the slide, you say? A. I was attracted by the noise; yes.

Q. Did you turn around at that time?

A. I turned around immediately and looked at it.

Q. Was there any water coming over the top at the place where the slide had broken loose?

A. No.

Q. How long was it before the water came over there?

A. I would say between 5 and 10 minutes, perhaps something like that, as near as I can remember—a short time like that.

Mr. HELLENTHAL.—You may cross-examine.
[495]

Cross-examination.

(By Mr. RODEN.)

Q. When did you see that stream?

A. This stream?

(Testimony of R. P. Lovely.)

Q. Yes. A. After the slide.

Q. You didn't see that stream before the slide?

A. No.

Q. The stream that you saw before the slide isn't on this picture at all, is it?

A. Yes, it shows here,—that is it there.

Q. I don't think so—you saw this one here.

A. I saw that one there.

Q. Don't you know this is a picture of the slide after it broke and not before?

A. I took it to be, yes.

Q. But this stream you saw before the slide, this little stream that is shown in here—

A. No, further up here. It was a larger body than shows on this picture. This picture doesn't show the condition as it was when the slide occurred. There was more water falling here than this picture shows.

Q. There was more water falling there?

A. Yes, a bigger body of water than shows on this picture.

Q. This exhibit 4 doesn't show the conditions as they were before the slide, as you saw them?

A. I am not speaking before the slide—I didn't observe that until the noise of the slide, and then I turned and saw it, and I saw this body of water on this side, apparently about here, as near as I can figure.

Q. After the slide?

A. Immediately after the slide.

(Testimony of R. P. Lovely.)

Q. Immediately after the slide you saw a body of water about here?

A. Yes. Just a moment, if you are showing just exactly—have [496] you got a better picture than that—more distinct?

Q. No.

A. As near as I can tell from the picture, it would be there, but that isn't very distinct.

Q. Show that to the jury.

A. It isn't very distinct, but I should say it would be about there.

Q. That was immediately after the slide?

A. Yes.

Q. Just as fast as you could turn around?

A. I had seen that water running there before.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) The water you saw before the slide was further to the right, and the water you saw after the slide was to the left of that—when the two streams were running?

A. In this direction, yes,

Mr. HELLENTHAL.—That is all.

(Witness excused.) [497]

Testimony of P. R. Bradley, for Defendant (Recalled).

P. R. BRADLEY, recalled to the witness-stand.

Direct Examination (Cont'd).

(By Mr. HELLENTHAL.)

Q. Mr. Bradley, you returned here from San Francisco what day?

(Testimony of P. R. Bradley.)

A. I think it was on the 4th of January.

Q. After the slide?

A. Yes; the 4th of January, 1920.

Q. Now, did you at that time go up to where the slide occurred? A. No, I went up the next day.

Q. The next day would be the 5th? A. Yes.

Q. Which way did you go up, Mr. Bradley?

A. I started from Gastineau Avenue, right in front of the slide, and went up the trail—I went up this trail up to the penstock.

Q. What, if anything—first, before going up had you made an examination of the slide itself?

A. Yes; I noted carefully the conditions in the slide area.

Q. What, if anything, did you see there in the way of bedrock water flowing out of the bank?

A. Oh, there was quite a little stream—a larger stream on the right-hand side, and a smaller one on the left-hand side.

Q. Two streams? A. Yes.

Q. Flowing off of bedrock? A. Yes.

Q. Did you observe those streams afterwards?

A. I only observed the larger one—that stayed there for some considerable time. I remember watching it for about a month, and I didn't pay any more attention to it after that.

Q. You watched it for a month and know it kept running for a month? A. Yes.

Q. After observing that slide area carefully you went up the [498] trail? A. Yes.

Q. What was the condition of that trail at that

(Testimony of P. R. Bradley.)

time, as to whether there was ice in it or not?

A. Oh, there was ice on the edges.

Q. There was ice on the trail at that time?

A. Yes; there was ice on the edges of the trail.

Q. Did you stop at the point immediately above the apex of where the slide broke loose?

A. Oh, yes, I stopped there and took particular observations of conditions at that point.

Q. What did you observe there in the way of evidences of wash?

A. I saw where the water had passed through the grass—there were indications of that—the grass was bent down hill—there were little sticks and leaves that were held by the grass, showing that the water had flowed over there at that point.

Q. At what point was that—can you point on the map just where that was, Mr. Bradley?

A. That was at this point right here.

Q. That evidence of overflow there was between the trail and the top of the slide? A. It was.

Q. Was there any abrasion—any cut in the soil?

A. No, there was no abrasion at all—the grass is all intact across the width where the water had flowed over but it was laying downhill, and as I said, there were leaves and various things stuck in the grass.

Q. It showed that water had been running there?

A. Yes.

Q. What was the condition of the trail with reference to wash?

A. The bottom of the trail had the appearance of

(Testimony of P. R. Bradley.)

having been cleaned out by running water—it was clean of brush, and there was no small stuff there. The surface was hard and packed. [499]

Q. Had the trail itself been washed out beyond that—I mean scoured out in any way?

A. No. When I speak of the surface of the trail I mean the center. The surface of the trail is more or less trough-like, and the center was fairly free from ice—the ice was on the sides of the trail. I presume there was more or less ice across the entire width of the trail at some time but it was gone by the water washing over it; and the center of the trail—the center of the trough was clean—free from small material.

Q. What was the condition of the trail between the administration building and the upper end of the slide in that regard?

A. It had the same general appearance.

Q. There was no more wash—that is, as far as you could see, above the apex of the slide than there was below it?

A. No; the appearance was about the same all the way down.

Q. Did you follow the trail up at that time to the penstock? A. Yes.

Q. Right to the penstock? A. Yes.

Q. Did you make an examination of conditions up there? A. I did.

Q. Could you see any evidence that water had been running from the spout of the penstock down the hill towards the trail? A. I did.

(Testimony of P. R. Bradley.)

Q. What evidence did you see?

A. The same that I saw at the point I have just described. I saw the grass was laying down—was bent downhill, and there were more or less sticks and leaves caught and tangled in the grass.

Q. Was it so you could follow the course the water had taken? A. Oh, yes, it was quite perceptible.

Q. What course did the water take from the penstock down the hill?

A. It went from the penstock to the trail, and followed the trail down. [500]

Q. How far had it to run before it got to the trail? Approximately, I mean.

A. Oh, I suppose 50 feet.

Q. Can you show on the map just about the course the water took from the penstock to the trail?

A. It came right down this way—I don't remember now whether the water struck this point or whether it came down and struck the trail here.

Q. But anyhow it came down either one or the other of those two points?

A. Yes; it came down, I judge by the contours, here—it came down right like that.

Q. Was there evidence of wash along the course that the water had taken up there?

A. No, there was no evidences of wash. The trail, as I say, was clean.

Q. I am speaking between the trail and the penstock.

(Testimony of P. R. Bradley.)

A. No, there were no evidences of wash there—there were evidences of flow.

Q. The water had flowed there? A. Yes.

Q. But there was no abrasion?

A. No, there was no abrasion.

Q. No cut of any kind? A. No.

Q. Not even a quarter of an inch deep?

A. No. I examined the place very carefully—there could have been a place a quarter of an inch deep that would have escaped my attention or observation, but after careful examination—I was looking for conditions that were there at that time—I failed to observe that the water had scoured the ground. That is one of the things I was looking for.

Q. And you traced the course of the water how?

A. By the matted grass—the grass being bent downhill. [501]

Q. Did you observe the conditions under the spout of the penstock—right under the penstock, where it dropped down? A. Yes.

Q. Was there any hole or any place there that the water had washed out?

A. No, I saw no hole there.

Q. Was there any hole there?

A. No, there was no hole there.

Q. Was there any trench running down the hill from there, of any kind?

A. No; the hillside was in its normal condition. It was covered with grass and blueberry bushes,

(Testimony of P. R. Bradley.)

small weeds, and things of that character—it was in its normal condition.

Q. There was no evidence of any trench ever having been there in that neighborhood?

A. No.

Q. Did you direct these pictures taken, Mr. Bradley?

A. Yes, I did; as soon as I arrived here, on the 5th, I gave instructions that the pictures be taken just as quickly as possible so that they would show the conditions as they existed at the time of the slide. I didn't want any delay about this because the more the delay the more the conditions would change.

Q. And they were taken as soon as possible thereafter?

A. I turned in the order to have the pictures taken, and I think they were taken two days afterwards, on the 7th.

Q. Now, have you observed the snowshed water coming off of that flume at any time?

A. Oh, yes, many times.

Q. You have? A. Yes.

Q. Under what conditions will the water run off there—what are the weather conditions when the water runs off there?

A. It will run off promptly after an unusually heavy rain, or it will run off there after a protracted period of normal [502] rain, or it will run off when there is a normal rain on the snow. When I say it runs off I mean in such a manner

(Testimony of P. R. Bradley.)

as to catch the eye, I should think, of any one. Near the tunnel there is water there all the time which is not perceptible.

Q. How is that snowshed arranged with reference to Portal Gulch?

A. Well, the planks that form the snowshed are right against the bank—right in the ravine—driven right in close so that the water that comes downhill will run over the top rather than run through.

Q. And that is the water that flows normally in Portal Gulch? A. Yes.

Q. That is where those sheds are?

A. Yes, at Portal Gulch.

Q. Have you observed that water from the snowshed building when there was a heavy rain, from Front Street?

A. Oh, yes, I have observed that many times.

Q. How does it look from Front Street when there is a very heavy rain?

A. It comes down there like a wide straight waterfall—the heavier the rain the wider it is. It comes over and leaps straight out towards an observer who might be on Front Street, like a thin sheet.

Q. Where does it come from as it leaves the hill?

A. It comes over the—

Q. Where does it shoot out from?

A. It shoots out when it strikes the roof—that is, out over the flume at that point.

Q. It shoots out from the roof, and how does it look from the street with reference to being one

(Testimony of P. R. Bradley.)

stream or different streams, or whatever appearance it makes?

A. After it shoots out it looks like one stream, because if there are several streams on the snowshed after they hit this roof they spatter and widen, and that makes it look like one stream.
[503]

Q. Now, do you know where the Gastineau tower used to stand in the slide area? A. I do.

Q. Do you know where the wires cross?

A. I do.

Q. If a slide were coming straight down the hillside there where this slide occurred, what effect would that have upon the wires at the point where they cross, if the slide came down in a mass, as it did in this case, where the tower stood?

A. Well, that would depend upon how they were fastened at the insulators.

Q. You know how those wires are fastened, do you not, Mr. Bradley?

A. No, I do not—I understand—I have been told—

Mr. RODEN.—We don't want to know what you have been told.

A. Yes; I understand they go through loops where the transmission line is straight.

Q. At this point was the transmission line straight? A. Yes.

Q. And the wires would run through loops at this point? A. That is my belief.

Q. What effect would it have on the wires at the

(Testimony of P. R. Bradley.)

point where they cross,—you understand and are familiar with the fact there are two legs on the tower, the two hind legs, still in the ground?

A. I have no knowledge of my own about it—I understand that to be the case.

Q. Under those conditions what effect would the movement of the earth there, a slide movement, have upon the wires?

Mr. RODEN.—We object to the question because the witness expressly stated that he doesn't know how the wires were fastened.

Mr. HELLENTHAL.—I mean upon the wires at the point where they cross.

Mr. RODEN.—He said he didn't know. I have his answer—"Depends upon the proposition of how the wires were fastened at the insulators." [504]

The COURT.—Is that your answer, that you do not know how they were fastened, and the effect would depend upon how they were fastened?

The WITNESS.—I said I did not know. I only have knowledge and belief upon that subject.

Q. (By Mr. HELLENTHAL.) You have no personal knowledge of how those wires were fastened?

A. No.

Q. Would it make any difference how they were fastened, upon the effect at the point where they crossed?

A. No, only the effect would be more marked,—it would be a difference in degree, is all.

Q. A difference in degree. Now, then, you may answer the question—what effect would it have

(Testimony of P. R. Bradley.)

upon the wires at the point where they cross if the slide mass should move very slowly?

A. My opinion of the movement of that slide mass is that it was very slow in effect, but it would not be a continued slow, even, progressive movement—it would be a series of movements. All ground that I have seen move, after it started it did not move gradually and progressively until the final collapse, but it moved by a little yielding—

Q. Little jerks?

A. Well, a little yielding, and I know that any disturbance of that character would so agitate the tower that it would set up an agitation of the wires.

Q. By agitation you mean in this case it would shake the wires? A. Yes.

Q. How would the wires shake?

A. The start—they might start to shake anyway, but eventually they would reduce themselves to an up and down movement. Even if they started sideways, they would come to an up and down movement before they came to rest again.

Q. I wish you would explain to the jury why that is so.

A. Just simply due to the fact that there are two forces that [505] work there, the first force being the force that is transmitted through the disturbance of the tower, which might have been a horizontal force; then you have the force of gravity, which is a vertical force. Those two forces are determining the way that that wire is going to vibrate. The force of gravity is the most

(Testimony of P. R. Bradley.)

continuous—a very persistent force, while the other is the declining force; therefore the last movement of that wire is going to be more or less vertical, or at least with a vertical component.

Q. The pull of gravity is there all the time, whereas the other pull may be by jerks, and then stop a little? A. Yes.

Q. All right. Have you made an examination of this slide on the hillside, Mr. Bradley?

A. I have.

Q. Know its character and its condition?

A. I do.

Q. Do you know the slope of the hill there?

A. I do.

Q. If a stream of water were turned loose at the upper end there where the penstock was—say a stream of water that would run through a 12-inch box—some such stream as that were to run down the hillside, what would be the first immediate effect upon the hillside?

A. Well, the first immediate perceptible effect would be the scouring of a channel for itself.

Q. It would cut a channel for itself?

A. Yes.

Q. Would it soak in to any perceptible degree, or would it run off, Mr. Bradley? Explain that to the jury.

A. On that slope I do not see how it could soak in to any appreciable degree.

Q. It would not stand still long enough?

A. No. [506]

(Testimony of P. R. Bradley.)

Q. The water would seek its lowest level?

A. The water would run right down the hill—come down in a small cataract, that volume of water.

Q. Come down like a small waterfall?

A. Yes.

Q. Is the slope of the hill exactly even, or does it undulate more or less?

A. The general slope is not even—you take it foot by foot and there is more or less unevenness to it.

Q. Would the water so running down the hill have any tendency to cause the material lying on the hillside to slide down?

A. In my opinion the water coming down that hill would keep to the surface—the original surface, until it scoured itself a channel. It becomes a carrier of stuff that is cut out of the channel—it is not clear water, it is muddy water, and the mud lying on the bottom puddles the water. There might be some water soak in, but in my opinion the amount of water that would soak in under those conditions would be negligible. Of course it would wet the ground, but to soak in to any appreciable extent, I don't see how it could do it—not on that slope.

Q. Couldn't soak in to such an extent as to make the ground heavier?

A. No, I don't think it would.

Q. And if the ground were all wet what would the effect be?

A. If the ground were wet itself, that much

(Testimony of P. R. Bradley.)

quicker would it scour itself a channel.

Q. It would cut its channel that much quicker?

A. Yes.

Q. And it would soak in that much less?

A. Yes.

Q. Could a stream of water of that size, or a larger stream, in any way have a tendency to cause the ground to slide?

A. Not in my opinion—it would scour a channel, and the minute [507] a channel is scoured the water is confined and it takes care of itself.

Q. If it ran long enough it would form a new gulch, is that the idea?

A. Yes, form a new gulch.

Q. These gulches on the hillside to some extent have been formed in that way?

A. They have been formed by water.

Q. That is the way rivers are formed?

A. Yes; they scour their own channels.

Q. Where water comes from the ground at different points, what does it do with reference to confining itself in one channel afterwards?

A. Of course the tendency of all water is to seek the lowest level, and if it all comes to the lowest level it is all at one point.

Q. The tendency of water is to form one channel?

A. Yes; to get to the lowest point.

Q. Do you know what the effect is, Mr. Bradley, of making a cut or excavation in the bank on one of these hillsides? A. I do.

Q. What would the effect be of making a cut

(Testimony of P. R. Bradley.)

or excavation in the hill there on the slope of Mount Roberts?

A. The effect will be that you have removed the support of a certain mass of that ground, and it is only a matter of time when the support is removed in making the cut before the ground will yield to the pull of gravity.

Q. By that you mean it will do what?

A. Slide.

Q. If there is no cut made on this hillside at a given point, the ground is left in its natural condition, is there any special danger of slides?

A. No, I don't think there is any danger of slides on that hillside anywhere if the natural slope remains undisturbed. I am [508] speaking of that part of the hillside lying below solid bed-rock.

Q. Lying below the trommel screen?

A. Yes, lying below the trommel screen.

Q. I wish you would explain to the jury how that soil is deposited, in the first place, on the hill.

A. My opinion of the origin of this particular soil on this particular hillside is that at one time this gorge was full of ice, and as the ice receded it left the bare mountain without vegetation and without soil, because the ice had stripped everything of that character away; and from time to time the elements that work would cause the rock to slough off—wear down to the bottom and pile up in the slope that we see it now; and that is what is called a talus slope—a slope with broken debris lying at

(Testimony of P. R. Bradley.)

the base; and this mountain has been there so many years it has weathered away into soil. Of course the amount of material lying there has been added to from time to time by other material that comes from the hillside above, but you can dig into that hillside through there and find where the rocks have changed to soil without changing their position. In other words, you have a mass of soil which was once originally a mass of rock, and you can see that they have changed to soil without changing their position.

Q. And those deposits made in that way, how are they made with reference to rainfall and things of that kind?

A. Of course during the time that this rock pile is weathering away the rain can percolate through there and that would have a tendency to gather the finer stuff together and make the mass more compact.

Q. What is the condition of this hillside soil with reference to being wet or dry, generally speaking? A. Well, that hillside is generally wet.

Q. Does the soil on the hillside often reach the point of saturation? [509]

A. Well, I have seen the upper surface of the hillside in many places there so slippery that it was dangerous footing, because you have an incline that is saturated and extremely slippery resting on the underneath soil which is hard and compact, but I have never seen that degree of saturation get

(Testimony of P. R. Bradley.)

far enough away from the surface so that the whole foot would go in, so to speak.

Q. By the term saturation, Mr. Bradley, what do you mean?

A. Well, that is rather a general term. Theoretically one means by saturation when a thing has absorbed all the water it can absorb.

Q. In times of heavy rains and when the snow thaws does the hill reach that point at times?

A. It does on the surface. Of course I don't know what is underneath the surface except where we have excavated.

Q. Where you have excavated what were the indications that that had existed during heavy rains.

A. At exceedingly heavy rains we find a maximum amount of moisture immediately on the surface, and, speaking generally, the moisture will decrease as you go down until you approach bedrock, then you will find more water again. There seems to be an intermediate area there that does not get much water.

Q. What would be the effect of that bedrock flow that you observed in this slide area with reference to causing the slide at that point?

A. The bedrock flow has a tendency to cause a slide for the reason that if there is an excavation made in the bank, the only reason that the bank does not slide immediately is because there is a certain amount of frictional resistance between the bank that is lying there and the bedrock, and also the cohesiveness of the mass itself, but if you have

(Testimony of P. R. Bradley.)

a bedrock flow you reduce the frictional resistance of the mass that is lying on the bedrock. [510]

Q. And that would have a tendency to loosen it?

A. That would have a tendency to reduce the friction between the two.

Q. By reducing the friction, what do you mean, Mr. Bradley?

A. The friction in that case is merely the hold that the bedrock has on the overlying dirt. That is one of the things that is holding that overlying dirt there when there is a place down below for it to slide.

Q. And the effect of those bedrock flows or springs would be what, upon the mass with reference to a condition of slide?

A. It reduces the conditions favorable to slide.

Q. By that you mean it would have a tendency to make a slide? A. It would.

Q. What is the condition behind the administration building, Mr. Bradley?

A. The condition behind the administration building, the soil on the hillside there is in a general way about the same as it is where this particular slide took place except I think the separate pieces of rock in the soil are much larger over there.

Q. And what is the ground generally there where you excavated?

A. Well, I don't know what the original angle of the excavation was, but I do know at this time a certain amount of the top has sloughed off and

(Testimony of P. R. Bradley.)

gone down into the bottom. The slope has just sloughed itself off.

Q. What effect does the existence of the foundation have at that point?

A. Well, the foundation of course is a barrier for any slide which might have a tendency to come at a depth deeper than where the surface of the ground meets the wall of the foundation.

Q. Acts like a bulkhead, in other words?

A. Yes; and the general mass—that portion of the excavation which lies above the point where it comes in contact with [511] the wall, that is free to slide.

Q. That will eventually slide unless the building is completed and something put there to hold it, is that right?

A. There is no reason to believe there won't be small slides there.

Q. Do you know about that other slide down towards the 50-stamp mill—did you examine that?

A. Yes, I did.

Q. What caused that slide?

A. That was caused by an excavation.

Q. That excavation, had that been completed at the time of the slide?

A. Yes; that had been completed and we were at work on the foundation for a hoist.

Q. And had you started work on the bulkhead yet?

A. No—there wasn't anything done there—just merely the raw bank.

(Testimony of P. R. Bradley.)

Q. The bulkhead had not been started?

A. No.

Q. What caused that slide?

A. The slide occurred because we took away the support of a certain amount of ground.

Q. And hadn't yet completed a bulkhead?

A. No.

Q. If a bulkhead had been put in there would it have been safe?

A. If we had substituted some support for the ground that we took away the ground would not have moved.

Q. That could have been done in the case of the Koski slide?

A. Yes; we have done that in a number of places around.

Q. Do you know the approximate distance from the flume to Front Street?

A. You mean anywhere along that hillside?

Q. I mean at a point opposite the soda works there, what would be the distance from the flume to Front Street in term of miles—would it be a quarter of a mile? [512]

A. No, it wouldn't be that much. I could judge it by that map, and I should say, according to that map, it would be about 500 feet.

Q. The elevation is 400 feet, isn't it—I mean in an air line, looking up from Front Street?

A. That 500 feet would be horizontal measurement. Of course following up on the slope it might be as much as 700 feet.

(Testimony of P. R. Bradley.)

Q. How high is the flume above the level there?

A. About 400 feet.

Q. If that is a 30 degree angle that would make it about 1200 feet, wouldn't it?

A. No, I don't think so, but I don't know—I am just guessing at it anyhow.

Q. You are only guessing at that—you don't know what it is—all right. Have you examined this trommel screen model here? A. Yes.

Q. Is that a duplicate of the trommel screen that was installed at the penstock at the time?

A. That substantially duplicates the over-all dimensions; it substantially duplicates the two end diameters, and is the same length. Of course it is only a model. The screen on the surface is exactly the same character as the screen on the original. There was no wood work on the original—it was all iron.

Q. These sticks on the original were all iron?

A. Yes.

Q. And this shaft was an iron shaft? A. Yes.

Q. The only difference between the original and this is that this is a model made out of wood whereas the original was made out of iron?

A. Yes, that is about it.

Q. The screen itself is the same?

A. Yes, the same character of screen. [513]

Q. And the size of the model is the same as the original? A. Yes.

Q. And in all respects it is like the original except the wood work?

(Testimony of P. R. Bradley.)

A. Except in the matter of material.

Q. Except in the matter of material, and the material in the screen is the same? A. Yes.

Q. How was that screen fastened, Mr. Bradley, in the original penstock? A. Fastened?

Q. Yes; these posts were not there, were they?

A. No, there were no posts there. The shaft is supported in boxes which rested on horizontal beams.

Q. That is the ends, at each end? A. Yes.

Q. How did the water get into the screen?

A. Came in at this small end, the flume being installed in a piece of sheet iron at that time, had the same curve as the trommel—just a short section.

Q. A spout? A. Yes.

Q. And it spouted in at that end, the end where you are standing—the small end? A. Yes.

Q. At this large end, what did you have at this large end?

A. We had—that large end came right near the end of the penstock, and there was a small sheet iron spout to take away the material that was rejected by the trommel.

Q. That sheet iron spout was under the screen so that the screen looped over it?

A. I don't recall that detail, whether there was any loop there or not. [514]

Q. You know that however it was, it was so arranged that the stuff coming out of the screen would come into the iron spout?

A. Yes, right down at the bottom.

(Testimony of P. R. Bradley.)

Q. And that screen at this end, also, there were no posts there?

A. No; that was supported in a box and rested on a horizontal beam.

Q. And that screen was kept in motion—revolving? A. It was.

Q. By the motor which you have described?

A. By an electric motor.

Q. And the water being turned in at one end screened through the screen, and the moss and leaves and stuff came out the other end, is that the situation?

A. That is the purpose of the trommel and the way it worked.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. You saw that screen a good many times, didn't you, before the slide?

A. Yes, I have been in the penstock quite a number of times.

Q. Do you now remember the details as to the direction of the spout?

A. No, that detail, I don't just exactly recall how that was.

Q. Now, you spoke about the cut that you had back of your administration building, and just the top of the bank has sloughed there, just a little, hasn't it? A. Yes.

Q. It doesn't amount to anything, does it?

(Testimony of P. R. Bradley.)

A. No, it doesn't amount to anything.

Q. And that has been there a good many years, too, hasn't it? A. I guess since 1913 or '14.

Q. Generally speaking, as you say, there is no danger of any slide on this sidehill unless somebody makes a cut there? [515]

A. Unless there is come disturbance made.

Q. A small disturbance might bring about a slide?

A. Yes; the slide that would result would be in proportion to the extent of the cut.

Q. This slide that you had down there between the slide area and the mill, how much of a cut did you have in there?

A. Oh, I don't remember exactly. Of course I never measured, but I think it was about 10 feet—that is pretty close one way or the other.

Q. Pretty steep, was it?

A. Yes, pretty steep.

Q. Just sloughed in?

A. Oh, well, the stuff came clear back to the tram line.

Q. Sure—moved down? A. Yes.

Q. But the fact remains nevertheless, Mr. Bradley, that when this mass moved down it began to move here, didn't it, at the weakest point?

A. Well, I wasn't there—I didn't see it.

Q. That would be your opinion as a mining engineer, wouldn't it? A. Well, yes.

Q. Sure.

A. Of course it yielded there to make way for the material that came from the back.

(Testimony of P. R. Bradley.)

Q. Yes, exactly; and you are acquainted with a good many cuts on this sidehill, aren't you?

A. I have seen a number of them, yes.

Q. There is practically no house on that sidehill that hasn't more or less of a cut, is there?

A. I couldn't say that because I haven't been behind them.

Q. You are prepared to say that a good many houses that are built on the sidehill have their foundations cut into the sidehill, aren't you?

A. Yes; that is what one naturally does. [516]

Q. You were below when the slide occurred, Mr. Bradley? A. Yes, sir.

Q. And you did not return until two or three days afterwards? A. No.

Q. And as soon as you got back you made an examination of the slide area? A. I did.

Q. And you found what you have called two bed-rock streams there, one of them, you say, was under the letter "D," and I believe the other one was under the letter "S," is that right?

A. That was the biggest, yes.

Q. The other one didn't amount to anything?

A. No; just enough water perhaps to run.

Q. Those streams were running on bedrock, were they?

A. Yes; they had every appearance of coming right out of bedrock; the bedrock appeared just below them, so one would naturally assume they had been running on bedrock and made their appearance there.

(Testimony of P. R. Bradley.)

Q. You don't know the source of those streams, do you?

A. No; I don't know where that water came from except it must have come from a higher elevation.

Q. Isn't it true that there is practically always some water running on bedrock on these sidehills, especially when it has rained or the snow is melting—the natural drainage is on bedrock on a side-hill, like this, isn't it?

A. No, I don't think so. I think most of it goes over the surface.

Q. Then you wouldn't want to tell us that all of this rainwater runs over the surface?

A. No, I am not saying it all runs over the surface.

Q. Or melting snow?

A. No, I am not saying it all runs over the surface.

Q. As a matter of fact the tendency of water, and snow water, is to go down and find its lowest level isn't it? A. Yes. [517]

Q. And the individual particles of snow as it melts, they are not sufficient to form a stream, and they run down and gather until there is a sufficient quantity accumulated to form a stream, isn't that true?

A. As soon as snow becomes melted and becomes water it will run down hill if there is any hill for it to run down—if it is flat it will stay there.

Q. There must be something to conduct it down?

(Testimony of P. R. Bradley.)

A. Gravity will conduct it—all it needs is a means to get down.

Q. In other words what I mean is this, it gets into the surface material and that becomes its medium of conveyance, does it not?

A. The surface is the medium over which it travels.

Q. Sure—the rain doesn't come down and lie on the surface, it rains through the dirt, isn't that true? A. I would say it rains over the dirt.

Q. Cannot possibly get into it?

A. Some gets into it, of course.

Q. And the water that drains along the bedrock certainly must have got down, unless it comes from a spring—must have got down from the surface.

A. Must have got down there or it wouldn't be there.

Q. Sure, and that is the way this bedrock drainage happens, isn't it?

A. No, I wouldn't say that. That water may run down the hillside on solid rock, and when it reaches the point where this dirt slope begins it may continue to follow the bedrock at that point, I don't know.

Q. In other words, the chances are it is not going to come to the surface. This is the sidehill—let's say, for the sake of the argument, that this is nothing but sheer rock, no overbrush, but down here the overbrush commenced— A. Yes.

Q. If the water comes down on the bedrock it is not going to [518] come down and follow the

(Testimony of P. R. Bradley.)

overbrush—it would follow the bedrock, wouldn't it, most naturally?

A. No, I wouldn't say that. The dirt lies pretty close to the bedrock in most places—if there were a small opening for the water to go through, and naturally filled up with the finer particles of clay, it would loose itself up in that. The rock on this mountain-side is badly shattered, and there are more or less fault planes and openings of that character in which water gets in.

Q. You think the rock is badly shattered, do you?

A. In places it is badly shattered, but there are a good many sheer planes in it that might be water channels.

Q. Oh, you and I can agree upon the proposition that quite a little of the natural drainage on this mountain-side follows the bedrock.

A. Oh, I will agree that some of it follows the bedrock. My opinion would be that of course there is some water on the bedrock, but I think as a general proposition the bedrock flow is small compared to the total run off.

Q. You think then that the run off is solely on the surface?

A. I think most of it is on the surface.

Q. Doesn't soak in at all? A. I didn't say that.

Q. Well, to amount to anything?

A. No, not to amount to anything.

Q. Now, when you came back, Mr. Bradley, you gave orders to have these pictures taken just as soon as possible? A. Yes.

(Testimony of P. R. Bradley.)

Q. And they were taken—those snowshed pictures—they were taken on the 7th day of January?

A. I wasn't present when they were taken. I think I got them the next day, and I think they are all marked the 7th, and that is my assumption, that that date is correct.

Q. The fact that that was an extremely heavy rainfall on the 7th [519] day of January was just merely an accident?

A. It was merely an accident. I ordered the pictures taken as soon as possible, and forgot about it until I got the pictures back.

Q. You got back the night of the 4th?

A. I think it was the night of the 4th, yes.

Q. And you examined the place on the 5th?

A. Yes; that is what I did when I started up on the 5th.

Q. On ordinary occasions, ordinary rains, the snowsheds don't show much water, do they?

A. No, I would say in order to show much water it would have to be more than an ordinary rain. We might say we had an ordinary rain yesterday or day before and there was no water on the snowsheds that was apparent. There was some water, of course—there would have to be, that being a gully, but it was not apparent to the eye.

Q. You think that as the tower began to move there as you say it might have done that the wires began to shake or vibrate?

A. Well, that is my interpretation of events there judging from the location of the tower and the way

(Testimony of P. R. Bradley.)

I have seen ground move when it starts to move.

Q. And it would also have a tendency to tighten up the wire, wouldn't it?

A. No, not unless the tower went down hill to some considerable distance; but even so, the sag between two of those Gastineau towers is, oh, I should say, at least 10 feet—that is a very small percentage—that is less than 10 per cent of the span, and so if a tower did slip down hill 2 feet it wouldn't take up much of those sags.

Q. We will put it this way; if the tower began to move, the wires would be tightened up—take out the slack?

A. If the tower moved bodily down the hill, of course that would be the case.

Q. So if it moved a quarter of an inch, theoretically speaking, [520] it would tighten up the wire, wouldn't it?

A. Theoretically speaking, yes.

Q. We have talked about a quarter of an inch several times in this case—for example, there might have been a quarter of an inch abrasion in the trail when you examined it on the 5th of January?

A. Oh, yes.

Q. Sure, that is the quarter of an inch that Mr. Hellenthal asked you about—he limited it to a quarter of an inch—you didn't take your fine instruments along with you to measure that, did you?

A. No.

Q. Might have been $\frac{3}{16}$ of an inch, possibly?

A. Yes.

(Testimony of P. R. Bradley.)

Q. But that is all you did see anywhere above the slide area—between here and the penstock?

A. What is the question, please?

Q. All the abrasion—all the evidence that you noticed between the apex of the slide and the penstock consisted of about a quarter of an inch, or thereabouts, along in here, following the trail?

A. Well, no, I wouldn't say that. I would say that all the evidence I saw in that trail is that the bottom had been freshly washed of fine stuff—the fine stuff was gone. If the bottom had been evenly eroded for half an inch I wouldn't know that—nobody would know it—nobody could tell it. It simply had the appearance to me that the rocks were cleanly washed, and the bottom was free from fine material—just what you might expect if you had washed the bottom of the trail.

Q. Well, right along in here, Mr. Bradley, there was quite a little evidence of wash, wasn't there?

A. There was just that evidence I spoke of.

Q. Not any more than that?

A. No, just the evidence I spoke of. [521]

Q. A quarter of an inch?

A. Oh, I didn't say it is a quarter of an inch—I say just the evidence I spoke of.

Q. Is this a steel tower also, Mr. Bradley, here?

A. Yes, that is a steel tower.

Q. And this here? A. Yes.

Q. How are those foundations constructed, of the steel towers?

A. Each leg is in a concrete pier.

(Testimony of P. R. Bradley.)

Q. There are four legs to a tower, and the legs are set in a concrete pier? A. Yes.

Q. And an excavation is made, I suppose, before that tower is put in there?

A. Oh, yes—they go to the surface.

Q. They go to bedrock?

A. They cannot go to bedrock. I presume they would go to bedrock if it was within easy reach, but they cannot go to bedrock in all places.

Q. They go to where they think it is necessary to go?

A. Yes,—if bedrock is a long ways off it is not necessary to go to bedrock.

Q. Yes, a long ways off. Mr. Bradley, can you tell about the distance—air line distance from the Pacific Coast dock—the old dock, to the penstock?

A. No, I cannot—I can only guess at it from the map.

Q. What is your best judgment on that?

A. You want my judgment from the map?

Q. Yes, approximately, Mr. Bradley, please.

A. From the Pacific Coast wharf to what point—the penstock?

Q. Yes. A. An air line?

Q. Yes. [522]

A. Well, I should say that is about 60 inches, 20 feet to the inch, that would be about 1200 feet, and you have got to take into consideration the elevation there—it might be 1600 or 1800 feet, more or less—something like that.

Q. That is the present Pacific Coast dock, the

(Testimony of P. R. Bradley.)

new dock down here—you know the one I mean?

A. It is the dock—it is the one that was there on January 2, 1920.

Q. Yes—that isn't the coal dock, the old coal dock?

A. No, it isn't the old dock; it is the new one.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. That would be a little over a quarter of a mile?

A. Yes, that would be over a quarter of a mile.

Q. The Pacific Coast dock is about 200 feet from Front Street, isn't it?

A. Perhaps a little more than that.

Q. Perhaps a little more, but I mean about that?

A. Somewhere in that neighborhood.

Q. And Front Street is about a quarter of a mile,—it would be about a quarter of a mile from Front Street?

A. Yes, I think I calculated it would be about a quarter of a mile.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

(Whereupon court adjourned until 2 o'clock P. M.) [523]

AFTERNOON SESSION.

March 29, 1921, 2 P. M.

Testimony of John Richards, for Defendant.

JOHN RICHARDS, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. John Richards.

Q. What is your profession, Mr. Richards?

A. Superintendent of the Alaska Juneau Company.

Q. I say your profession. A. Mining engineer.

Q. Do you know the Alaska Juneau Gold Mining Company? A. I do.

Q. What position do you occupy with that company? A. Superintendent.

Q. How long have you occupied that position?

A. Since September, 1914.

Q. How long have you followed the occupation of mining engineer?

A. I have been mining the greater part of my life—since I was a young man.

Q. Mining in some capacity practically all of your life? A. Practically all my life.

Q. Now, Mr. Richards, before I forget it, you have seen this model of the trommel screen?

A. I have; yes.

(Testimony of John Richards.)

Q. That is a correct model of the original that was installed at the penstock at the time of the slide? A. It is.

Mr. HELLENTHAL.—I offer this in evidence, if your Honor please.

Mr. RODEN.—No objection. [524]

(Whereupon the model of the trommel screen was received in evidence and marked Defendant's Exhibit No. 9.)

Q. Now, Mr. Richards, you are familiar with the properties of the Alaska Juneau Company?

A. Yes.

Q. With the mine and the mill and all other matters connected with both the mine and the mill?

A. Yes.

Q. Familiar with the water system? A. Yes.

Q. And with the devices used in connection with the carrying of water? A. I am.

Q. And all those things? A. Yes.

Q. You were familiar with those things at the time this slide occurred? A. Yes.

Q. And had been for some years prior thereto?

A. Yes.

Q. Do you know how much water was flowing in the flume of the Alaska Juneau Company above the penstock two days before the slide? A. Yes.

Q. How much water was flowing in it?

A. An average of about 2 inches in depth.

Q. How much was let in at the regulating gate?

A. The regulating gate was raised from the bottom of the flume one inch.

(Testimony of John Richards.)

Q. And the water behind it would force it to the extent that there would be 2 inches below the regulating gate? A. Yes.

Q. About 2 inches. Now, Mr. Richards, Mr. Bradley just suggested that you explain the position of the regulating gate—where [525] is the regulating gate situated?

A. The regulating gate is situated about 250 feet north of what is known as the north portal of No. 3 tunnel—that is the tunnel that goes through Mount Roberts.

Q. What is the reason for putting it at that particular place?

A. The reason for putting it there is to have it as near the tunnel as possible, and also to let what water we didn't use overflow and go back down into Gold Creek again.

Q. What connection, I want you to explain to the jury, is there between your regulating gate and the intake of the Alaska Electric Light and Power Company's flume?

A. It is directly on the side hill above the intake of the Alaska Electric Light and Power Company's flume, and any water that we do not require is turned out of the side of the flume a short distance above this regulating gate and runs down to the Alaska Electric Light and Power Company's intake.

Q. And it was as far down as you could put it and still get the water into the Alaska Electric Light and Power Company's intake; is that it?

(Testimony of John Richards.)

A. Yes, sir.

Q. And the Alaska Electric Light and Power Company have the first right to the water?

A. As I understand it.

Q. Except that you get your boiler feed water?

A. Yes; we claim the boiler feed water.

Q. How much water is required for boiler feed?

A. I couldn't say how much is required, but we have a 4-inch line that is running to the power plant.

Q. What I mean to say, Mr. Richards, is how much water do you allow to run into the tunnel where it is used for boiler feed purposes only?

A. About 2 inches of water, that I referred to a short while ago that was in the flume.

Q. That was for boiler feed purposes only? [526]

A. Yes.

Q. And that water running in the flume furnished no water in the mill?

A. That might not all be used in the power plant, and if it isn't used it would go to the mill.

Q. But generally speaking—of course a few drops might go to the mill, but what I mean is not whether a few drops would get to the mill, but whether it would supply the mill with water?

A. Oh, no, no.

Q. And that was the quantity running in two days before the slide?

A. Yes; that was the quantity running in for several days before the slide.

Q. How was it the day before the slide?

(Testimony of John Richards.)

A. The same amount.

Q. And that was as to the entire day before the slide? A. Yes.

Q. And also two days before the slide?

A. Yes—quite a long time before the slide—I don't exactly know how long.

Q. Don't know the exact number of days, but for some time before the slide that was all the water that was running in the flume? A. That was all.

Q. How long did that condition continue—how long was it that there was no more than that amount of water running in the flume with reference to the time when the slide occurred?

A. That condition existed until about 8 o'clock or shortly after.

Q. Eight o'clock or shortly after of what day?

A. On the morning of January 2, 1920.

Q. Prior to 8 o'clock on the morning of January 2d the water flowing in the flume that leads into the penstock did not exceed 2 inches in depth in the flume? A. That is correct.

Q. Now, on the morning of the slide, when did you come to the works? [527]

A. Oh, I came over and got to my office about a quarter to seven.

Q. What did you do after you got there—I don't mean with your little detail work, but I mean with reference to matters involved here?

A. About 8 o'clock or shortly after I got at the regulating gate in the flume.

(Testimony of John Richards.)

Q. You went up to the regulating gate in the flume? A. Yes.

Q. Now, at that time, prior to 8 o'clock that morning, how was the mill supplied with water?

A. They were being supplied with water by our salt-water pumping system.

Q. How much water were you pumping?

A. About 3,000 gallons per minute.

Q. And that water was pumped into what is called the mill tank on that Exhibit No. 2?

A. That was taken from Gastineau channel and pumped into the pipe system and into the mill tank.

Q. Now, what, if anything, did you do at about 8 o'clock, or shortly thereafter, in the way of changing that situation?

A. I raised the regulating gate to a height of 7 inches.

Q. How much water would that furnish you?

A. That would furnish about 3000 gallons per minute.

Q. About the same amount the mill was using?

A. Yes.

Q. So that the salt-water pump could be shut down? A. Yes.

Q. When you got to the regulating gate on that occasion how did you find the gate?

A. The gate was one inch.

Q. One inch from the bottom? A. Yes.

Q. Then you raised it to what extent?

A. I raised it to 7 inches. [528]

(Testimony of John Richards.)

Q. And that would give about how much flow in the flume?

A. That would give about 9 inches in the flume.

Q. That would give about 9 inches in the flume?

A. Nine inches in depth.

Q. The pressure as the volume went up didn't force as much water through as it would when it was only an inch open?

A. No, the head above the gate was a little higher than the water in the flume on this side of the gate.

Q. And what was in excess there spilled over?

A. Yes, the excess water went over the side and continued down the creek.

Q. That belonged to the Alaska Electric Light and Power Company? A. Yes.

Q. Prior to that time had there been enough water in the flume to supply the Light Company and furnish you with any water for the mill?

A. No.

Q. Then after you opened the regulating gate what did you do—where did you go?

A. I came back through the No. 3 tunnel, along the railroad track, and back to the mill.

Q. At that time did you stop at the trommel screen? A. I did not.

Q. Not at that time. Now, going through the mill where did you go to?

A. I went through the mill to the different floors, and then stopped at the mill office.

Q. Then where did you go?

A. After leaving the mill office I went down to my

(Testimony of John Richards.)

own office, down around the wharf warehouse, and different places.

Q. Went about the works? A. Yes.

Q. How long would it take the water to get from the regulating gate to the mill—that is, to the penstock? [529]

A. The amount of water that I turned in?

Q. I am speaking about how long it would be before any water would come through?

A. That depends on the volume—the amount of water that is turned in.

Q. I am speaking now of the conditions that existed that morning.

A. Some of the water would probably get through the No. 3 tunnel in 25 minutes.

Q. How long would it be before the whole head would get through?

A. Be anywhere from an hour to an hour and a half.

Q. There would be some water a long time before the whole head would come through?

A. Oh, yes.

Q. Then about half-past nine there would be water at the mill tank—that is, sufficient water to shut down the pumps?

A. Yes; at half-past nine there should be an equal amount—there should be just as much water coming into the mill tank as was turned in.

Q. Prior to that time there would be some water?

A. Yes; the water would gradually increase.

Q. Now, at about half-past nine where were you?

(Testimony of John Richards.)

A. At half-past nine, or thereabout, I was in the shed which leads from the street to the mill.

Q. Where were you going?

A. I was going to the mill.

Q. Going to the mill from your office?

A. Yes.

Q. Before that time you had been in your office?

A. Yes.

Q. Now, what, if anything, did you observe at that time in the way of flashes?

A. Well, I observed a very bright flash and also heard the report from the same.

Q. In what direction was that flash from where you were? [530]

A. Well, it appeared to me to be coming from a northwesterly direction. The reason why I thought it was coming from a northwesterly direction, in the shed that goes from the street to the mill, on the northwesterly side there is one board that is taken off of the shed its whole length and this flash appeared to come in from that side.

Q. Now, can you point on the map, Mr. Richards, to the place where that shed was situated?

A. The shed comes up here and right up here to the lower part of the mill, marked as "Stairway to mill."

Q. It is marked as "Stairway to mill," on the plat? A. Yes.

Q. And that shed covers the stairway?

A. Yes, that shed covers the stairway.

Q. And the northwesterly direction would be in the direction towards—

(Testimony of John Richards.)

A. Would be on this side, yes.

Q. At about that same time what did you observe with reference to power conditions in the mill?

A. Well, I didn't observe anything in the mill at that time.

Q. How long afterwards—

A. Well, it was shortly afterwards that I knew there was some power trouble on the line connecting the compressor—that was the first intimation I had of something being wrong with the power.

Q. It was right after that flash that you learned there was trouble in the mine compressor?

A. Yes.

Q. How was the mill—did you learn later about power disturbances there?

A. Yes; I found out later there had been power disturbances in the mill.

Q. That was the only flash, I believe, that you saw yourself, Mr. Richards? [531]

A. That was the only flash that I remember seeing, Mr. Hellenthal.

Q. Now, after that where did you go, or what did you do in the way of shutting off the salt-water pump, if anything?

A. After I got to the mill I discovered that there was an overflow from the mill tank and the salt-water pump was shut down.

Q. There was an overflow at the mill tank and you ordered the salt-water pump shut down?

A. Yes.

Q. That was about half-past nine, would you say, Mr. Richards?

(Testimony of John Richards.)

A. It was around there—may have been a few minutes after.

Q. Might have been a little later?

A. It was near 9:30, yes.

Q. From that time on did you use any salt-water in the mill that day? A. No.

Q. The mill was supplied with fresh water through the fresh-water system? A. Yes, sir.

Q. And the salt-water pumps remained shut down? A. Yes.

Q. Then what did you?

A. I went around the works.

Q. You went around about the works? A. Yes.

Q. When, if at all, did you again visit the regulating gate?

A. Oh, I returned to the regulating gate somewhere about 10:30.

Q. About 10:30?

A. Yes; may have been a little later than 10:30, but somewhere about that time.

Q. The regulating gate would be a considerable distance to the northwest of the extreme right-hand side of the map?

A. The regulating gate is about 2500 feet north of what is known as the penstock—about 2500 feet north of there in the direction that the tunnel is running up on the map. [532]

Q. Do you know where those lights are in the tunnel? A. I do.

Q. Where are they situated? Describe to the jury so they will understand what they are for.

(Testimony of John Richards.)

A. There is three sets of lights right where the two tunnels come together, and they were put there for the purpose of lighting that portion of the tunnel because the men coming from town and going up the trail get on the cars at that point to be taken into the mine, and the lights are there for that purpose, to enable them to get on and off the cars.

Q. When you went through the tunnel at that time were the lights on or off?

A. They were on at that time.

Q. Then where did you go,—did you proceed on to the regulating gate?

A. Yes, I went to the regulating gate.

Q. How did you find the regulating gate at that time?

A. The regulating gate was in the same position I had placed it in that morning.

Q. Nothing unusual about it?

A. Nothing unusual about it then.

Q. It was open how wide? A. 7 inches.

Q. The flow was how much—about 9 inches?

A. The flow in the tunnel was about 9 inches between the flume and the regulating gate.

Q. Above the regulating gate?

A. Above the regulating gate I didn't measure it, but I know it was deeper—about 10 to 12 inches.

Q. Where did the surplus water go to that didn't pass down the flume?

A. That passed out the side of the flume a matter of a foot or so above the regulating gate.

Q. What did you have there to permit it to pass at that time? [533]

(Testimony of John Richards.)

A. There is an opening cut in the flume about 30 inches wide, and it is so arranged that a stopper could be put in, or you could fill that opening right up with a series of boards.

Q. It was a spillway?

A. Yes, a regular spillway.

Q. An ordinary spillway, is that it?

A. That is it.

Q. All right. On your way back towards the mill on that occasion you again passed the place where these lights are? A. I did.

Q. How were the lights—were they on or off?

A. They were burning as usual.

Q. Then did you stop at the trommel screen?

A. I did.

Q. Did you go into the trommel-screen house?

A. Yes.

Q. What, if anything, did you do in the way of examining conditions there?

A. I looked over everything there—looked over the trommel and everything thoroughly.

Q. Was the trommel revolving? A. It was.

Q. Was there any water coming out of the spout that is designed to carry off the leaves to the outside of the house? A. There was not.

Q. There was no water coming out?

A. No, no water was coming out.

Q. All the water was passing through the screen?

A. All the water was passing through the screen into what is known as the penstock.

Q. And finding this was all right you went to the mill? A. Yes, sir.

(Testimony of John Richards.)

Q. That was about what time? [534]

A. That was about 10 minutes to eleven.

Q. How do you now fix the time as being about 10 minutes to 11?

A. The reason the time is so plain to me, I had to go to town that morning, and I wanted to come up town before dinner, and in getting down to my office I went by the way of the railroad track to the head of the wharf incline, and the hoist man at that place leaves there at 11 o'clock, and I know that I barely had time to get to the incline and be lowered down on the car.

Q. Before he went off duty?

A. Before he went off shift, or before he went to dinner.

Q. Did you get there in time to be lowered at that point? A. I did.

Q. Point out to the jury where that was on the map?

A. I came along on the railroad track here and got on the car at this point. The hoist is situated back in here—I got on the car and was lowered down this incline to the street.

Q. And that was before that man went off shift?

A. That was a few minutes before the hoist man went off shift.

Q. Where did you go then?

A. I went to my office.

Q. After you had gotten into your office that morning did you notice anything in the way of electric disturbances on the lighting system?

(Testimony of John Richards.)

A. Yes; I noticed that the voltage dropped and the lights became low.

Q. Flickered?

A. Yes, flickered, and went down and came back up again.

Q. Went down and up. How long did you remain in the office, Mr. Richards, at that time,—that is, if you know?

A. I don't know exactly. I know that I went around some—whether that was before I went into the office, I don't remember—I know I went around the wharf, around the dock, and walked around the different places, and I don't know exactly [535] how long I stayed in there—probably 5 or 10 minutes.

Q. Probably longer?

A. It might have been longer.

Q. You left the office and went where?

A. I left the office to go up town.

Q. And that would be approximately about what time?

A. Oh, that would be probably 15, maybe 20 minutes after 11.

Q. 15 or 20 minutes after 11—somewhere around there?

A. Somewhere around there—I couldn't say to the minute.

Q. On your way uptown did you stop anywhere?

A. I went in the power plant on the way up town.

Q. How long did you stay in the power plant?

A. May have stayed in the power plant a matter

(Testimony of John Richards.)

of minutes—may have been in there from three to five minutes.

Q. You don't remember?

A. I don't remember—I know I was in there only a short time—I couldn't say whether it was 3 minutes, or it might have been 7 or 8 minutes.

Q. You went from there where?

A. I went up town then.

Q. You continued on your way to town?

A. No, I went in the vicinity of the sawmill boarding-house and that is as far as I got.

Q. Whom, if anyone, did you meet there?

A. I met Earl Higgins.

Q. Who is Earl Higgins?

A. He is our chief electrician.

Q. Then did you continue on your way after meeting Higgins, or did you go back?

A. No, I returned with Higgins.

Q. Why did you go back at that time?

A. Because Higgins had informed me that a slide had occurred and had taken out several houses and apparently had buried up or killed some people—considerable damage done; and he also [536] informed me that there was water coming through the trommel screen and coming down over the slide.

Q. Over the slide? A. Yes.

Q. Then what did you do?

A. I beat it back as quick as I could to get to the office.

Q. What did you do after you got to the office?

A. Immediately on arriving at the office I tele-

(Testimony of John Richards.)

phoned to the compressor man to have all the water shut out of our flume.

Q. What else did you do?

A. Right after that I phoned to Mr. Clauson in the mill and told him what I had learned in regard to the slide and asked him to proceed immediately to the trommel screen and see if there was anything wrong there, and to size up conditions there, and to see what he could find.

Q. Who is Mr. Clauson?

A. Mr. Clauson is our mill superintendent.

Q. And after telephoning Mr. Clauson to that effect what did you do?

A. I went over then to the mill incline and got on the car there and went up on that car, and went to the trommel screen myself.

Q. Where is the mill incline, Mr. Richards?

A. The mill incline starts right here, and runs up to the upper part of the mill, or up to the crushing floor of the mill.

Q. And from there you walked up to the track?

A. Yes.

Q. And from there did you proceed to the trommel screen?

A. Yes, I went right over to the screen at that time.

Q. When you got to the screen was the water spilling over? A. It was not.

Q. It had been stopped?

A. There was no water running over the screen when I got there.

(Testimony of John Richards.)

Q. At that time did you make an examination to determine or [537] see whether there had been any water running?

A. Well, I looked over the whole situation right from the trommel screen down to the head of the slide.

Q. Did you find any evidences that water had been running out of the spout at the trommel screen?

A. There was a slight evidence that water had overflowed there.

Q. What evidence did you find, Mr. Richards?

A. The evidence that I found was simply the brush—there is a lot of blueberry bushes there, and small growth, some coarse grass, which had been bent down the hill, and there was also some leaves and pine needles and debris that had been discharged from the trommel screen at some time, and that in turn had been carried down and was scattered along over the brush.

Q. So you could see where the water had run?

A. Could see that some water had run over there.

Q. Was there any cut in the ground, or anything to show that the water had scoured the ground itself?

A. No, there was no cut in the ground at all.

Q. No evidence of scour then?

A. None whatever—nothing of a cut.

Q. Did you follow or trace the water down the hill at that time? A. Why, yes, I did.

Q. How did the water run? Can you point with the pointer on the map where the water ran to?

(Testimony of John Richards.)

A. Yes; apparently the water came out of the spout here and took a course right over in to about here; and then followed the trail right down here—some came both ways here, came down to that point—from that point I didn't pay much attention to the water, but I noticed there was some evidence there that some water had left the trail and had went in over the slide area.

Q. That is right above where the slide occurred?

A. Right above the slide. [538]

Q. What evidence was there that water had spilled over there, Mr. Richards?

A. Just practically the same evidence as I have stated. There was no brush through there—it was all grass—that was matter down and laying down-hill, and there was a few leaves and some sand and fine gravel laying in that grass, to the head of the slide.

Q. Was there any cutting there?

A. There was no cut there at all.

Q. Was there any cut at any place in the vicinity of the spout where the water had struck the ground?

A. No, sir.

Q. Nothing at all? A. No.

Q. Now, that morning, Mr. Richards, did you observe any water running over the snowsheds and shooting off from the flume level—you know where the water shoots over there?

A. Right at the portal of the old No. 3 tunnel?

Q. Yes.

A. Yes, there was water running over that portal that morning.

(Testimony of John Richards.)

Q. That is along the course marked Portal Gulch on Exhibit No. 2? A. Yes.

Q. Where those sheds are how much water was there running over those sheds that morning?

A. There was quite a lot of water—I couldn't exactly say how much—there was several streams of water running there.

Q. As they emerged from the flume level how many streams were there, or did it show up as only one stream?

A. It united there more or less, when it struck the flume, and as it glanced from the flume it was more than one stream.

Q. Have you ever observed that water flowing there on occasions when there were heavy rains, from the street?

A. I have a number of times. [539]

Q. How does it look from the street, Mr. Richards,—where does the water seem to come from when you are looking at it from the street?

A. It would seem to be coming from the flume, is where the water would seem to be coming from if a person didn't know.

Q. Do you know how it appeared to any one that didn't know about the situation up there?

A. There has been several occasions, Mr. Hellen-thal—

Mr. RODEN.—Wait a minute. We object to the question because it is entirely hypothetical, based on no facts—as to how it would appear to somebody who don't know anything about it. He don't

(Testimony of John Richards.)

know how it would appear to anybody who didn't know anything about it.

The COURT.—The question is almost impossible to answer with any degree of accuracy. It might appear one way to one person who didn't know, and another way to another person who didn't know.

Q. You may answer that question yes or no, if you know how it would appear to any one not familiar with the situation? A. I do.

Q. How do you know?

A. Because there have been a number of occasions when your office was notified that our flume was running over, and upon investigation I found the flume was not running over—it was water running at this point, and it was taken to be running from the flume.

Q. Now, you are familiar with the penstock construction, Mr. Richards? A. I am.

Q. And know how the pipe leading from the penstock runs, to where it runs, and how it runs?

A. Yes, sir.

Q. And as to the volume of water it would carry?

A. Yes.

Q. As compared to the volume of water that can enter the penstock? [540] A. Yes.

Q. How much water will the pipe carry as compared to the water that will go into the penstock?

A. It will carry over twice as much.

Q. Under those conditions is there any occasion for the establishing of a spillway at the penstock?

A. There is not.

(Testimony of John Richards.)

Q. A spillway could serve no purpose there whatever? A. Serve none—it would be useless.

Q. Have you a spillway to take care of your surplus water when you get more water than you need?

A. We have.

Q. Where is that spillway?

A. That is situated at the mill tank.

Q. Now, at the mill tank what becomes of the waste water there?

A. The overflow or spill from the mill tank is carried by a flume down to the tailings flume to help pass the tailings along.

Q. It is put to use? A. It is put to use, yes.

Q. Not wasted. Now, do you know how the ground drains in the vicinity of the spout there—what the natural drainage is? A. I do; yes.

Q. What is the natural drainage?

A. The natural drainage is where it is marked on the map as “natural drainage.”

Q. Have you ever seen that water going in that direction from the spout when the spout overflowed?

A. I don’t recall ever seeing the spout overflow, Mr. Hellenthal.

Q. You don’t remember of ever having seen the spout overflow? A. No.

Q. Do you recall ever having traced the water down there when the spout had overflowed?

A. No.

Q. Or don’t you remember? A. No. [541]

Q. The ground, however, Mr. Richards, at that point indicates to the eye where the drainage is?

A. Yes, the contour lines show that.

(Testimony of John Richards.)

Q. And if you were on the ground could you see it? A. You could see it plainly, yes.

Q. Could the water coming from that spout, flowing down that natural drainage, could that harm anybody—was that a safe place to let the water run off or run through?

A. It was a safe place to let it run—it could do no harm.

Q. Now, Mr. Richards, what, if any, devices did you have in the mill at the time of this slide, to notify those in the mill of the condition of the water at the mill tank?

A. There was an indicator which was operated by a float; the float was in the mill tank, and a line went from that float over a couple of balls; and there was an indicator or a pointer that was on a chart or a board which had the feet marked on it; so as the water would rise or fall in that tank the float would rise or fall with it, and would bring this indicator up and down, and would point and indicate the number of feet of water that was in the tank. Now, if the water dropped down to—Oh, I am not positive of the point, but if it dropped down beyond a certain point that flashed a red light, and when the tank was full there was a green light burning—there was some electrical apparatus there so the contact was made when the pointer would get at certain points; and as soon as the red lights were on the mill man knew there was a shortage of water. There was also another apparatus rigged up, which I am not very familiar with, which rang a bell.

(Testimony of John Richards.)

However, I couldn't explain that because I am not familiar with it.

Q. The electrician knows more about how that was connected? A. Yes.

Q. If there was a break in the flume or any water spilling over at the trommel screen, or any water escaping anywhere on [542] your flume line, would that become evident in the mill?

A. That would become apparent just as soon as it would occur, yes.

Q. Give you notice at once. What was the necessity of keeping the water steady in the mill?

A. Well, they need a steady flow there for milling purposes. If the pressure goes up or down, their flow fluctuates, and gives them considerable trouble.

Q. The solutions are lost in that case? A. Yes.

Q. Now, you are familiar, Mr. Richards, with the character of the hillside below the penstock?

A. Oh, yes.

Q. And also familiar with the character of the soil at the point where the slide occurred?

A. Pretty familiar, yes, sir.

Q. The soil conditions on that hillside, how do they compare with conditions on the hillside generally in this neighborhood?

A. Not much difference.

Q. What would be the effect of running water upon that hillside if a volume that would run through a 12-inch box, or even a larger volume, were turned loose at the penstock and permitted to run down—turned loose anywhere, through an open-

(Testimony of John Richards.)

ing in the flume or a spout in the penstock, or some place like that?

A. In my opinion it would cut a gutter, or channel, for itself.

Q. And would it soak in?

A. Not to any great extent; no.

Q. The steepness of the hillside would prevent that? A. Yes.

Q. What would the water do—where would it flow?

A. The water would flow downhill, naturally, until it got down into the channel.

Q. Find its lowest level? A. Yes.

Q. If there were no trail above that slide area there, and no [543] snowbanks or anything else to divert the water—conditions were perfectly natural, and water came out of the spout, where would the water run to?

A. If there was no trail there, and everything was perfectly natural, it would come down the gulch I would say.

Q. Would there be any possible way for it to run in the direction it ran on this occasion?

A. I think not.

Q. There is a gulch on each side of that ridge?

A. Yes.

Q. And the water on this occasion came down the ridge?

A. Came down what is known as the hog-back.

Q. Do you know what the effect is of making a cut or excavation in the banks on this hillside?

(Testimony of John Richards.)

A. Yes.

Q. And what results when you make an excavation in the bank and leave it without a bulkhead?

A. Slides invariably occur.

Q. Is there any way to tell how soon a slide will occur? A. I don't think so; no.

Q. It will occur sooner or later?

A. It might occur soon or it might stay a long time before anything would slide.

Q. When slides occur on a hillside of that character, does the slide material move rapidly or slowly?

A. My observation—anything that I have seen moving, whether it is ground on the side hill, or whether it is solid rock or anything else, it does not move rapidly. At first there is generally some sign of creeping—a slight movement at first.

Q. And it is how long generally before it precipitates itself down the hillside?

A. That is hard to determine. It might slip—might be some movement there to-day and it might come to rest and it might [544] not move again for two or three days—it might be a week, or it might be a month.

Q. In any event it would creep along slowly before it would be precipitated downhill?

A. Yes, and naturally when it would start you might expect it would go further later on.

Q. Are you familiar with the hillside above the flume level, Mr. Richards?

A. To a certain extent, yes.

(Testimony of John Richards.)

Q. Are you familiar with that part of the hillside which lies above the place where the penstock used to be?

A. Yes, I am familiar with that—that is, as far as a person could go up there, or as far as you could look up.

Q. You have been up there as far as you can go?

A. I have been up as far as I can go.

Q. And made an examination? A. Yes.

Q. What did you find there in the way of conditions—whether that ground there is safe ground or otherwise?

A. I wouldn't consider it safe ground. I have known large boulders to come down there and make deep impressions along the bank there and take out part of the trail, and have known rocks to slide down there—I wouldn't consider it a safe condition.

Q. What is the condition of the soil mass up there?

A. Above the trommel screen there might be some soil in the gulches for probably a hundred or maybe two hundred feet above that—it hasn't much soil—straight bluffs.

Q. What, if anything, happened in the way of a slide occurring at that point during the summer of 1920?

A. Well, there was a large boulder came down there and came right immediately behind the penstock and the change room, which is marked on the map, and went right underneath the flume and between the two bents in the trestle. [545]

(Testimony of John Richards.)

Q. How large a boulder was that?

A. Well, I would say from the—I didn't see the boulder, but from the impression that it made in the ground I would say that it would be a boulder that weighed probably 1500 pounds or more—a ton—maybe more.

Q. Do you remember the occasion when Mr. Dudley was up there? A. I do.

Q. When was the time that boulder slid down there with reference to the time Mr. Dudley was up there?

A. That was just shortly before Mr. Dudley was there.

Q. You pointed it out to Mr. Dudley? A. I did.

Q. Just one question to be sure that I have it in the record. At the time you saw the flash that you saw from the stairway, is that the time the power went out in the mine?

A. I think that is the time that the power went out in the mine, yes,—I know it was somewhere around 9:30.

Q. At that time the power went off at the compressor in the mine?

A. At that time the power went off at the compressor in the mine and that shut the air off from the mine.

Q. The other power remained on?

A. Yes, the electrical power remained on.

Mr. HELLENTHAL. — That is all; you may cross-examine. [546]

(Testimony of John Richards.)

Cross-examination.

(By Mr. RODEN.)

Q. Now, Mr. Richards, when you examined the ground below the penstock after you went up there and after the slide, you saw evidences of where water had been, I understood you to say, the same as the other witnesses, along about in here?

A. Yes, I said that I saw evidences of water coming over that way.

Q. And it was the fault of the trail that the water did not run down the place marked here "Natural Drainage"?

A. I didn't see whether any water run down there or not.

Q. Yes, but it should have run down this way, shouldn't it—that is the natural drainage?

A. That is the natural drainage.

Q. The water was somewhat refractory and obstreperous and went over the hill?

A. It may have been.

Q. And that was the fault of the trail?

A. As I say, there was evidence of water coming down that way—I don't know why it came that way.

Q. That day at least we know it did not follow the natural drainage?

A. Well, the water that came that way did not follow the natural drainage.

Q. Yes, that is what I want to get at. You say that you know how the water coming from those snowsheds, off from the penstock, would look to

(Testimony of John Richards.)

people standing on Front Street, do you?

A. Well, from the intimation that we had, being telephoned that there was water coming from our flume and on investigation we found that there was no water coming from the flume but it was coming over the snowshed.

Q. Now, how did it look to Higgins when he told you that the water was coming from the penstock?

A. You will have to ask Higgins that—I don't know how it looked to Higgins. [547]

Q. You said you knew how it looked to people who were on Front Street—there is one man that you don't know how it looked to?

Mr. HELLENTHAL.—I object to that as not cross-examination.

The WITNESS.—I didn't say I knew how it looked to Higgins.

Q. You said on your direct examination you knew how it looked to a man standing on Front Street, and I am trying to get you to give me the name of one single man who told you how it looked to him.

A. Well, I have told you the reason I thought it looked to people that it might be coming from the flume. I am telling you that we were telephoned to—

Q. You don't want to answer my question, is that right? Give me the name of one single person who told you how it looked to him from Front Street.

A. I can give you the name of the person who telephoned to me and said it was coming from the flume when it was coming from the snowshed.

(Testimony of John Richards.)

Q. I want you to give me the name of a single man who told you how the water looked to him from Front Street.

Mr. HELLENTHAL.—The witness hasn't testified that anybody that stood on Front Street told him how it looked. That is the difficulty with the question.

The COURT.—Yes, Mr. Roden, I think the witness' testimony is simply that it must have appeared to people that the water which was coming over the snowshed was coming from the flume because they had notified the company that water was coming out of the flume and upon investigation they found it was coming over the snowshed. If you ask him the name of a single person who did that, of course that question would be right in line.

Mr. RODEN.—That is what I am going to do in the next question.

The COURT.—Your question was to give the name of some person who looked at the water from Front Street and said it was coming from the flume when as a matter of fact it was coming from the snowshed.

Q. Tell us the name of anybody that telephoned to you. [548]

A. I don't know who telephoned—I don't recollect who telephoned, but I can give you the name of a person who told me water was coming from the flume.

The COURT.—Then why don't you do it? The

(Testimony of John Richards.)

name of anybody who telephoned, or talked, or anything else.

A. Nels Sorby.

Q. He told you water was coming from the flume and it was coming from the snowsheds?

A. Yes.

Q. More than once he told you that, I suppose?

A. Yes.

Q. Nels Sorby lives right below, in what is known as the Sorby apartments, don't he? A. Yes, sir.

Q. And if he goes out of his way a little he can see the snowsheds very plainly?

A. He should be able to.

Q. And a man on Front Street could very well tell whether that water was coming over the snowsheds or coming out of the flume, couldn't he, if he had his eyesight at all?

A. Well, I would know whether it was coming from the flume or coming from the snowsheds.

Q. So would anybody else that looked up on the sidehill, wouldn't they? A. I wouldn't say that.

Q. On this particular day, Mr. Richards, there was quite a bit of water coming over the snowsheds, wasn't there?

A. There was some water coming over the snowshed.

Q. Was there as much water coming over the snowshed that day as this picture shows?

A. I think there was.

Q. Do you remember how the rain was on the morning of the 2d?

(Testimony of John Richards.)

A. I remember exactly, or as near as it is possible for a person to remember.

Q. How did it compare with the average rainfall?
[549]

A. I have seen it rain harder than it did on the second.

Q. You have seen it rain a great deal harder, haven't you? A. Yes.

Q. It was raining a great deal harder, wasn't it, when that picture was taken than it was on the 2d?

A. I wouldn't say that.

Q. It was the heaviest rain in 20 years except the rainfall in September, 1918; isn't that right?

A. I have been in Juneau over 20 years, and I have seen it rain harder than that.

Q. On the morning of the 2d you got to your place around the works shortly after seven o'clock?

A. Yes.

Q. You have everything that you did that morning figured out to the second, haven't you?

A. No, I think not. There were probably a hundred and fifty things I did that I haven't mentioned.

Q. At 9:30 you went to the mill?

A. Somewhere about 9:30.

Q. And at 10:50 you were at the penstock to look at the trommel? A. Yes.

Q. And at 11:15 you went into the power plant?

A. I wouldn't say exactly 11:15.

Q. The way you have it figured out it comes out exactly so that you were at the penstock looking at

(Testimony of John Richards.)

the trommel screen when nobody else was up there, doesn't it?

A. How is that? I didn't get your question.

Q. I say there never was anybody else around the trommel screen there, and the slide, when you were up there?

A. There was nobody else around there, you say?

Q. Yes. A. I don't know.

Q. You didn't see anyone?

A. No, I didn't see anyone there. [550]

Q. You are the superintendent there, aren't you?

A. Yes.

Q. You have a watchman looking after that flume, haven't you? A. We have a flume-tender.

Q. And he takes in the penstock as well as the rest of the flume, doesn't he?

A. He takes in from the penstock on to the intake of the flume—on to the dam.

Q. Early in the morning you began running up the hill to the regulating gate on the flume, didn't you? A. I didn't say that I ran up there.

Q. You went up there?

A. I went up there, yes.

Q. That was around 8 o'clock or so?

A. Around 8 o'clock.

Q. Then you came back? A. Yes.

Q. And attended to some business down around the plant, and later on that same morning you went back to the gate again? A. Yes.

Q. Is that the occupation which you follow down

(Testimony of John Richards.)

there as superintendent, to turn the sluice-head up there?

A. It was my occupation that day—or part of it.

Q. The whole morning of the second,—let me put it this way, I won't say the whole morning, but most of the morning of the 2d you devoted to running up to the gate, 2500 feet from the penstock approximately, through the tunnel out on the flume to where the gate was located, down to the mill, and knowing how your gate is regulated, an hour and a half or so later you run up there again to see if it is still there and you find it there? A. Yes.

Q. And then you come back and take a look at the trommel screen, and everything is in fine order there; then you go back to the [551] plant, and that is the way you put in most of your time that morning, isn't it? A. It didn't take all morning.

Q. It took a good deal of the morning?

A. It took some time; yes.

Q. And that is what you did as superintendent of an eight thousand ton plant?

A. I have told you what I did, yes.

Q. Of an eight thousand ton plant?

A. By doing that I was able to save for the company about a hundred dollars a day, and I thought it was right for me to do that.

Q. The flume-tender couldn't do that?

A. I couldn't get in touch with the flume-tender.

Q. Not at once, but couldn't you get in touch with the flume-tender on the phone?

A. I might if he was around the telephone—he

(Testimony of John Richards.)

don't carry a telephone around with him.

Q. You had other men working on that flume line on this day, didn't you?

A. Not that morning—there was only the one man.

Q. Wasn't Kelly working on that flume line or in the tunnel? A. Kelly worked there later on.

Q. And Kelly works for three and a half a day, I suppose? A. No.

Q. There were other men working there, weren't there?

A. There were some working down along the track that afternoon.

Q. That morning, you mean?

A. Well, that morning, yes.

Q. Whom you could have reached prettily easily by telephone?

A. No, I couldn't reach them easily by telephone—they were some 3,000 feet—between 2,000 and 3,000 feet away from the telephone.

Q. That is why you took several trips up there and attended to that water racket yourself. What was the flume-tender doing [552] that morning?

A. Well, we will probably have the flume-tender on and you can ask him. He was busy with his work, attending to his business.

Q. Isn't it his particular business to attend to this gate?

A. It is under ordinary circumstances, but this was an extraordinary circumstance.

Q. After you went up there the second time,—

(Testimony of John Richards.)

after you had set the gate 6 or 7 inches, what was the extraordinary circumstance that took you up there the second trip?

A. I went up there to see that the gate was in the same position I had put it in the morning.

Q. You expected to find it that way, didn't you?

A. Yes, I expected to find it that way.

Q. You had no reason to think anybody had changed it?

A. There was a possibility that the ditchman might come along and lower that gate, as I had not notified him that I had raised it.

Q. You wanted to get as much water as you could?

A. I wanted to get enough water to enable us to shut down the salt-water pump.

Q. And the gateman, or the ditch-tender knew that as well as you did?

A. No, he didn't that morning.

Q. Don't you ordinarily want to get as much water through that flume as you are able to use?

A. We had not been getting plenty of water through that flume—that was in the winter-time, and the ditchman does not take it upon himself to let in 6 or 7 inches of water without being told to do so.

Q. That is why you went up there the second time?

A. I told you I went up to see if the gate was in the same position I had put it in.

Q. Did you have any reason to believe that the

(Testimony of John Richards.)

gate would not be in the same position? [553]

A. I told you before the ditchman might come along there and see that the gate was raised and put it down because he didn't know that it was going to be raised. It happened that morning that I didn't see him there or I would have told him that I was going to raise the gate.

Q. There was nothing at the mill tank to show that there was anything wrong with the water?

A. There was an overflow at the mill tank when I left there.

Q. The red light had not jumped up?

A. No.

Q. The green one was on?

A. The green one was on.

Q. When you came down intending to go to town you met Mr. Higgins? A. Yes.

Q. And he told you that the penstock was overflowing? A. No, sir.

Q. What did he say?

A. He said there was water coming out of the screen.

Q. He said what?

A. Said there was water coming out of the screen.

Q. He couldn't see the screen, could he?

A. He knew where the water was coming from.

Q. Don't let us quibble about the proposition—it was coming out of the penstock, wasn't it?

A. It was coming out of the screen which is in the penstock building, over the penstock.

(Testimony of John Richards.)

Q. It was coming out of the penstock, then?

A. No, it wasn't coming out of the penstock.

Q. Out of the penstock building?

A. It was coming out of the penstock building—the building that is over the penstock; coming through the screen that is in the building over the penstock.

Q. There are two buildings, then, the one that the penstock is in, and the other one is on top of it?

A. One is,—well, it is apt to be called anything before [554] we get through here.

Q. Tell me what you have it marked on your map here—what does it say? That is what we are talking about, isn't it—that is where the water was coming out of, isn't it? A. That says penstock.

Q. It says penstock—all right. And then you went back to the office as fast as you could?

A. After meeting Higgins?

Q. Yes. A. Yes, sir.

Q. Sure—and you telephoned to Clauson in there?

A. Yes, I telephoned to Clauson.

Q. To immediately go up to this penstock?

A. Yes.

Q. What was the rush about if the water up there couldn't do any damage?

A. Why, I phoned to Mr. Clauson to go there—

Q. What did Clauson answer you?

A. Why, he said all right, that he would go right away. There was no question about it at all—he was directed to go, and Mr. Clauson went there.

(Testimony of John Richards.)

Q. All right—he was directed to go—you told him to go immediately?

A. I told him to go to the penstock and see what the conditions were.

Q. In your direct examination you used the word “immediately.”

A. I wouldn't be sure—I told him to go there right away, yes; I don't know whether I used the word immediately or right away—it would mean the same; but that was my inference, for him to proceed there as soon as possible.

Q. Now, then, by this time you had also given orders to shut the water off, hadn't you? A. Yes.

Q. Well, what was the hurry for you to get up there?

A. I wanted to see conditions there. [555]

Q. He is the mill foreman, isn't he?

A. He is the mill superintendent.

Q. He didn't say anything to you at that time about having noticed any disturbance in the water supply down at the mill, did he? A. No.

Q. He was running the mill the same as he had been doing before, wasn't he?

A. Yes, as far as I know—I couldn't say positively.

Q. So the penstock was flooding over and apparently the mill was also running at the same time?

A. I didn't say the penstock was flooding over.

Q. The spout was flooding over?

A. There was water coming through the screen.

Q. So on this occasion the water coming through

(Testimony of John Richards.)

this spout was not indicated anywhere at the mill tank?

A. Well, I didn't see the mill tank at that time.

Q. But as near as you know?

A. As near as I know.

Q. Well, now, Mr. Clauson had quite an important position down there, too, didn't he? A. Oh, yes.

Q. He had quite a number of men working under him? A. Yes.

Q. And everything was going pretty well down there in the works?

A. Oh, it was going all right as far as I know.

Q. And it took another important officer of the company to go up there and take a look at the screen—who else went with him?

A. I know that Mr. Nordling went with him—now, whether they went right together from that point, or whether they met at some particular point I couldn't say, but I know that the two men arrived there about the same time.

Q. What is his position?

A. He is an electrician.

Q. And you made a bee-line for the penstock, didn't you? [556]

A. I went to the penstock as soon as I could after telephoning.

Q. Why did you go up there?

A. Well, I went up there to investigate.

Q. The water couldn't overflow,—the penstock couldn't overflow?

A. I went up to investigate.

(Testimony of John Richards.)

Q. To investigate something that apparently couldn't happen,—water was coming out of that penstock, wasn't it?

A. Water didn't run out of the penstock.

Q. And you really found some of the leaves washed away when you came up there from the spout of the penstock, didn't you? A. Yes.

Q. And nothing else?

A. There were some pine needles, chips, brush—I wouldn't say leaves only.

Q. And the blueberry bushes were looking downhill?

A. What small brush was there were bending downhill.

Q. You didn't find any blueberries there, did you?

A. No.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. At the time you telephoned Clauson, was the mill running? A. Yes.

Q. I mean were the motors running—was the power on? A. Oh, that I don't know.

Q. You had no knowledge of that at all?

A. No, I had no knowledge of that, no. I say I had no knowledge—yes, I had knowledge of that because I learned in going through the power plant that everything was dead.

Q. You had no other knowledge of what the conditions at the mill were? A. No.

(Testimony of John Richards.)

Q. You hadn't been up there?

A. No, I hadn't been up there.

Mr. HELLENTHAL.—That is all. [557]

Recross-examination.

(By Mr. RODEN.)

Q. You knew everything was dead when you went through the power plant?

A. I was informed that the power was all off.

Q. Mr. Hellenthal asked you the question if the mill was running and you said yes, didn't you?

A. When he asked me I was thinking of the—

Q. Just answer yes or no,—you said yes, didn't you? Did you say yes or no? I want you to answer the question whether you said the mill was running.

The COURT.—Of course the record shows what he said, and he could not change it one way or the other. You asked him what he said—it is for the jury to say what he said. He could not make it different by saying something else now, but if you want him to explain his two answers ask him to do it, but do not simply say, "You said so and so."

Q. All right. When Mr. Hellenthal asked you whether or not the mill was running you said yes, and then you looked at Vic Clauson and he shook his head, and then you said no, didn't you?

A. No, I didn't look at him.

Q. You didn't look at him when he shook his head? A. No, I didn't.

Mr. RODEN.—Well, I did. That is all.

(Testimony of John Richards.)

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Explain that to the jury.

A. I would like to have the questions and the answers read to me.

Q. I asked you this question, Mr. Richards,—I don't know whether you understood me or not,—I asked when you telephoned Clauson, was the mill running at that time?

A. Well, I telephoned Clauson twice that morning, Mr. Hellenthal, and when you spoke I was thinking of the first time I talked to him. If I said the mill was running, I had reference to [558] to the first time I talked to him. If I said the mill was running at the time I telephoned to Clauson after the slide occurred, I said it in a mistake.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [559]

Testimony of George T. Jackson, for Defendant.

GEORGE T. JACKSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. George T. Jackson.

Q. Where do you live, Mr. Jackson?

A. Juneau.

Q. What is your profession?

(Testimony of George T. Jackson.)

A. Mining engineer.

Q. How long have you followed that profession?

A. Well, I have been engaged in mining since 1897.

Q. In what countries have you mined?

A. In New Zealand, Egypt and Alaska.

Q. You are at the present time general manager of the Alaska Gastineau Company's properties?

A. The manager, yes.

Q. And you have occupied that position for some years? A. Yes.

Q. Now, Mr. Jackson, do you remember the day of the slide which is now the subject of inquiry?

A. I do.

Q. January 2, 1920? A. Yes, sir.

Q. In the forenoon of that day where were you?

A. I was in my office in the Goldstein Building.

Q. Now, between the hours of 9 and 10 of that morning from your office in the Goldstein Building what, if anything, did you observe on the hillside in the way of flashes?

A. I observed quite a large flash somewhere in the vicinity between where the slide occurred and the Alaska Juneau mill, and I immediately called up our—

Q. Just a minute. That was at what time, Mr. Jackson? [560] A. About 9:30.

Q. Do you know where the wires of the Alaska Gastineau Company and those of the Alaska Juneau Company cross? A. Not positively I don't.

Q. But the flash occurred between the slide area

(Testimony of George T. Jackson.)

and the mill? A. Yes—somewhere in there, yes.

Q. What did you do?

A. I called up our chief electrician and he told me there had been a short circuit on the line.

Q. That was immediately after that flash?

A. Immediately after the flash.

Q. Now, Mr. Jackson, were you at the slide that day?

A. Yes; I visited the slide something over half an hour after it occurred.

Q. When you visited the slide what, if any, evidence did you see of bedrock water flowing out of the slide area?

A. There was quite a stream of water flowing from the bedrock.

Q. Can you indicate on the map there about the place where the stream was coming from from the bedrock?

A. I walked up as far as one of our towers here, and it was coming from this way.

Q. Where the word “slide” is?

A. Yes, somewhere in there. One of the towers was carried out, I think about here, and I walked out to that point.

Q. And the region where the word “slide” appears on that map, there was a stream of bedrock water flowing? A. Yes.

Q. Will you point out the vicinity of the hillside where you saw the flash?

A. The flash occurred somewhere along here, as

(Testimony of George T. Jackson.)

near as I can tell. It was like a flash of lightning—I couldn't tell exactly.

Q. What volume of water was coming from the bedrock at the time you saw it? [561]

A. Well, I would judge there would be enough water for to fill a 12-inch box, about 3 inches deep.

Q. Quite a flow? A. Quite a flow, yes.

Q. Where would that bedrock water come from,—how did it get to bedrock—what course did the water take in getting to bedrock?

A. It must have been from the melting of the snow and the rain there, I would say, on the previous days.

Q. There had been a good deal of snow on the mountain-side? A. Very much, yes.

Q. And that had been melted?

A. Most of it had been melted, yes.

Q. What were the weather conditions as to whether it was warm or otherwise?

A. It was fairly warm the day of the slide—I should judge about 40.

Q. And the snow had been melting for several days—two or three days?

A. Yes, it had been running two or three days.

Q. Was there a big run off at that time?

A. Yes, there was quite a run off of water.

Q. Larger than ordinary?

A. Large for that time of the year.

Q. Now, Mr. Jackson, on that day did you know of any slide that happened on your property?

A. Well, we had a slide,—I wouldn't say it was

(Testimony of George T. Jackson.)

that particular day but within a day or two of that—that occurred in our Salmon Creek flume.

Q. At Salmon Creek? A. Yes.

Q. What caused the slide in your Salmon Creek flume?

A. The excessive rainfall caused the slide and the slide carried out the flume. [562]

Q. Where did it occur with reference to—was there any cut in the ground at the point where the slide occurred?

A. Yes; the flume had been cut into the bank—in our grade for the flume.

Q. That had taken away the support from the mass that slid? A. Yes.

Q. Or did that have anything to do with the slide occurring at that point?

A. Yes; it weakened the support, and with the excessive rains the hillside just slid down.

Q. The cut weakened the support and when the excessive rain made the mass wet and heavy it slid down? A. Slid down; yes.

Q. Mr. Jackson, what would be the effect of permitting running water to come out of a spout or flume in one place upon the hillside above the slide area, that hillside—the slope of Mount Roberts—you are familiar with that, aren't you?

A. Oh, yes.

Q. What effect would that have upon the slide mass lying upon the surface?

A. The water would cut a channel for itself sooner or later.

(Testimony of George T. Jackson.)

Q. Would it have the effect of soaking in and causing a slide, if it were left in one flow?

A. Not a volume of that kind, I don't think.

Q. If a cut were made in the bank say 8 or 10 feet deep, or something of that kind—some cut were made in the slide area itself—an excavation, for the purpose of putting up a building or some such purpose, what effect would that have upon the bank, provided, of course, there was no support put in—no bulkhead put in?

A. If a cut were made in the bank it would weaken the bank and sooner or later it would slide or slip off.

Q. You have had a good deal of experience with cuts in the mountain-sides [563] here, have you, Mr. Jackson, in connection with your operations? A. I have.

Q. What has been your observation in that regard?

A. If you put a cut in the side of the mountain, invariably it will slide sooner or later.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. That is, it will slide and fill in the cut?

A. It will slide in and fill the cut, or it will even cause a big slide.

Q. Slough in?

A. It will slough in and run up quite a distance.

Q. But the slide would generally start at the foot of the cut? A. Somewhere about there.

(Testimony of George T. Jackson.)

Q. It wouldn't start four or five feet back from there?

A. No; it would continue back quite a distance though.

Q. That is where the slide occurred on your flume out here? A. Yes; it started at the cut.

Q. Speaking of this bedrock water, that is what you call natural drainage, isn't it?

A. I don't know whether it was natural drainage—it was evidently due to the heavy rains on the previous days.

Q. Now, when water comes down a sidehill such as this sidehill is, Mr. Jackson, there are openings and interstices and crevices in there that the water goes down into, aren't there? A. Part of it does.

Q. And finally it has to appear on bedrock again?

A. Yes, it has to come to bedrock.

Q. Cannot go any further? A. No.

Q. And of course if that bedrock becomes exposed anywhere the [564] water will be seen?

A. Yes.

Mr. RODEN.—Sure. That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. With the Court's permission I will ask this question—I forgot to ask it on direct examination. What effect would that bedrock flow have that you mentioned in causing a slide of the mass above?

A. With a very steep hillside like that mountain-side, the water would cause a slide, especially if there had been a cut.

(Testimony of George T. Jackson.)

Q. More especially if there had been a cut?

A. More especially if there had been a cut, yes.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. And if the cut were about 400 feet distant from where the slide occurred you would ascribe the bedrock water as the cause of the slide, would you?

A. I would have to know where the slide did occur.

Q. Suppose that the ground broke 400 feet above this cut?

A. I haven't heard the evidence, and I do not know whether—

Q. No, I suppose not, Mr. Jackson. This is practically a hypothetical question. Suppose a break would occur 400 feet above the cut?

A. It couldn't—there would be no influence on the slide if it was 400 feet from the cut.

Q. Your steel towers—this steel tower that was in the slide area was one of your towers?

A. Yes.

Q. You know where the two lines cross—do you know how far the wires are apart there?

A. No, I don't know. [565]

Q. How are those steel towers anchored, Mr. Jackson?

A. Generally with a hole dug down to bedrock, and then there was a hole drilled in the bedrock and one point of the tower was driven into the hole

(Testimony of George T. Jackson.)

and built up from it. All of the four legs are put on bedrock.

Q. Are in concrete foundations?

A. Not if we have to go down more than 3 feet to bedrock, the holes were drilled down in the bedrock and the towers put in in that way.

Q. Do you know how this particular tower was constructed? A. No, I don't.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Speaking of where the slide occurred, I think you and Mr. Roden did not understand one another. Where the slide mass has a length such as indicated here of 300 to 500 feet from the cut up the hill, where the mass that slid is of that size—at what point do you understand, Mr. Jackson, that the slide occurred?

A. Well, judging from what I saw of it within about just half an hour afterwards I would say the slide started at the foot.

Q. You would say that the slide started at the foot? A. Yes, I would say so.

Q. And the whole mass of course would come down at the same time? A. Follow it down, yes.

Q. Follow it down at the same time?

A. That is the way it appeared to me.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. Was the water still running out of that

(Testimony of George T. Jackson.)

flume when you got there, Mr. Jackson?

A. I did not observe any water at all. [566]

Q. If there had been any kind of a stream coming down there at that time you would have seen it?

A. There was no water running on the top of the ground above the slide.

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock A. M. Thursday.)

MORNING SESSION.

March 31, 1921, 10 A. M.

Testimony of George Oswell, for Defendant.

GEORGE OSWELL, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. George Oswell.

Q. Where do you live, Mr. Oswell?

A. Ebner Mine.

Q. What is your profession?

A. Mine superintendent.

Q. You are the superintendent for the United States Mining, Smelting and Refining Company?

A. Yes.

Q. Who are operating what is known as the Ebner property? A. Yes, sir.

(Testimony of George Oswell.)

Q. You have been engaged as such for a number of years, I believe? A. Yes, sir.

Q. Were you at your works on the 2d day of January, 1920? A. I was.

Q. What are the soil conditions on the mountain-side up there—you are acquainted with the soil conditions on the mountain-side [567] there in a general way? A. Yes, sir.

Q. And you are also familiar with the soil conditions on the slope of Mount Roberts?

A. I am, yes.

Q. How do the soil conditions compare in those two places—are they the same?

A. Very similar.

Q. On the 2d day of January, in the forenoon of that day, just prior to the slide that occurred here, what, if anything, in the way of a landslide did you have up there?

A. We had a landslide up back of the Ebner buildings.

Q. How large a slide was that Mr. Oswell?

A. Why, it was quite a large slide. It came down from just above the Perseverence road and covered the road to quite an extent—perhaps 75 or 100 feet long and 6 to 8 feet deep of muck and mud.

Q. Was that the width of the slide there?

A. Yes, sir.

Q. Was there any flume or anything of that kind above the place where this slide came from?

A. No flume within 500 or 600 feet of it.

Q. And there was no flume above it at all, was there? A. No flume above it.

(Testimony of George Oswell.)

Q. Now, last fall what, if anything, did you have in the way of a slide right immediately below the place where this one broke loose?

A. We had one there in December last year.

Q. That was a smaller slide? A. Yes, sir.

Q. And this slide came right from above where that slide had broken loose last year?

A. Yes, sir.

Q. It was in December, just preceding this other slide? [568]

A. Yes, in the December preceding the 2d of January of last year; and also one this last December in the same place.

Q. There were three slides in that same place?

A. Yes; that is laying on the road up there now.

Q. There was one in December, 1919?

A. Yes, sir.

Q. One on the 2d of January, 1920?

A. Yes, sir.

Q. And also one last year? A. Last December.

Q. In the same place. Now, Mr. Oswell, what would be the effect on the surface if a stream of water, say a sluice-head or more of water were turned loose on the mountain-side of Mount Roberts, turned loose in one stream, and permitted to flow down the mountain—would that stream be in one place?

A. It would depend on the condition of the ground, its slope—if it was reasonably flat it would spread.

Q. But if the slope was 30 degrees or more steep?

(Testimony of George Oswell.)

A. It would cut a channel.

Q. It would cut a channel and run down the hill?

A. Yes.

Q. If the ground were flat of course the conditions would be different? A. Yes.

Q. It might soak in? A. Yes.

Q. Mr. Oswell, you have observed landsliding—groundsliding? A. Yes, sir.

Q. Now, how does that slide—does it break loose all at once, or does it work slowly and progressively?

A. It cracks away—might take some time to come, but it generally gives some warning—you will see a crack in the earth.

Q. And it comes slowly at first?

A. Yes, sir. [569]

Q. And after it gains momentum it will come down faster? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. That refers particularly to conditions where ground breaks in the mine, doesn't it,—where the roof breaks?

A. It will do it in the mine or even on the surface.

Q. What indications would it give on the surface?

A. You would see a crack,—a crack would be noticeable in the ground.

Q. Whereabouts would you see the crack with reference to where the slide commences?

A. You will see it around the upper edge of it.

Q. If there were a cut in the bank and the moun-

(Testimony of George Oswell.)

tain-side rose up from the cut, the break would occur most likely at the cut, wouldn't it?

A. Yes, most probably it would.

Q. Those slides you had up there, they came down the gully, didn't they?

A. No, right on the side of the hill.

Q. Didn't they come down the hog-back?

A. Yes, it is kind of a hog-back.

Q. You can still see that hog-back?

A. Yes, sir; it is there to be seen.

Q. It is on the Basin road? A. Yes, sir.

Q. Was there a cut in the mountain-side at the foot of this slide? A. No.

Mr. RODEN.—That is all. [570]

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Did you say the slide would commence at the cut? The crack wouldn't be at the cut?

A. No, it would be up above, where the ground was coming down.

Q. The cut would be at one end and the crack at the other? A. Yes.

Q. When you say there was no cut up there, one of these slides was right below the other, so one slide made a cut for the other?

A. Each and every time it goes further up the hill—goes further up each time.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) Suppose this crack had been on the hillside and a volume of water flowed into that crack, would that in any way hasten

(Testimony of George Oswell.)

conditions in bringing about a slide?

A. Hasten it, no doubt.

Q. (By Mr. HELLENTHAL.) And a volume of water flowing from the bedrock would hasten it?

A. Yes; no doubt would hasten it.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of L. H. Metzgar, for Defendant.

L. H. METZGAR, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. What is your name? A. L. H. Metzgar.

Q. What is your profession?

A. Mine superintendent.

Q. Where are you employed at present? [571]

A. Alaska-Treadwell.

Q. What position do you hold with the Alaska-Treadwell? A. Superintendent.

Q. How long have you held that position?

A. About three years.

Q. How long have you been following mining?

A. Twenty years.

Q. And previous to that time what did you do?

A. Farmed some and railroaded some.

Q. Mr. Metzgar, are you familiar with the penstock of the Alaska Juneau Company that was there at the time of the slide?

(Testimony of L. H. Metzgar.)

A. Not specifically, no.

Q. In a general way you know what the situation was there, don't you? A. Yes, I do.

Q. Where a penstock is situated—I am referring to this place as a penstock now because it has been so referred to in the trial, although technically speaking, from an engineer's point of view, you may object to that term,—it may not be a penstock, but for the purposes of the question I will refer to it as a penstock and you will know what I mean—where a penstock is used for the conveyance of water, and the flume emptying into it, is of less capacity than the surface pipe leading out of it, and the surface pipe is kept open, of course, is there any occasion for an overflow at that penstock?

A. No, there is not.

Q. No chance for it to overflow? A. No.

Q. The overflow would be about where?

A. The overflow would be taken care of automatically by the pipe leading from the penstock.

Q. There would be no occasion for an overflow under those conditions? A. No. [572]

Q. Now, you are familiar with trommel screens of this type? A. Yes, sir.

Q. Do you know how the flow of water is in Gold Creek? A. Not particularly.

Q. We will assume that the water of Gold Creek is clear nearly all the time, but it sometimes has some debris in it, such as moss, leaves, and things of that kind, during freshets, if a trommel screen of the type that has been received here in evidence were

(Testimony of L. H. Metzgar.)

installed at the penstock, to screen the water at the penstock, and the trommel screen is operated by an electric motor, would there be any occasion to expect that that thing would ever spill over?

A. No, there would not.

Q. The only way it could spill over would be by filling the meshes up with moss so that the moss would carry the water over?

A. That is the only way it could happen.

Q. And you would not expect that to happen?

A. No.

Q. Would you under those circumstances think there was any necessity to build any flume or any other discharge device to take care of this water that might come from it? A. No, I would not.

Q. You have never heard, Mr. Metzgar, of any such device being constructed, have you?

A. No, I have not.

Q. In all your mining experience? A. No.

Q. Now, Mr. Metzgar, what would be the effect of a stream of water running,—you are familiar with the slope of Mount Roberts? A. Yes.

Q. And with the angle of the slope, 30 degrees?

A. Yes. [573]

Q. And the character of the soil upon it?

A. Yes.

Q. What would be the effect if a stream of water, say one or two sluice-heads or even more, were liberated at the point where this penstock used to stand, about 400 feet above the level of the sea,—liberated in one stream, what effect would that have upon the hillside, if any?

(Testimony of L. H. Metzgar.)

A. Cut a channel or find a channel that was already cut.

Q. Find its way down hill?

A. Yes, find its way down hill.

Q. Would that water soak in?

A. Not very generally, no.

Q. It would flow down in a solid stream?

A. Yes.

Q. Have you observed the action of water under similar circumstances, on similar hillsides with these here? A. I have.

Q. You may tell the jury of a specific instance where you have observed it under similar conditions.

Q. There was an instance down at Sheep Creek where the water took the trail out. The pipe-line broke and the entire flow of the flume went out of the penstock and down the hillside and washed a large channel,—washed it to bedrock, until it found its way back into the creek again.

Q. How large a flume is that, Mr. Metzgar?

A. It is about 3 feet by 4 or 5—I won't be sure about the width.

Q. Do you know about its carrying capacity in cubic feet per second?

A. I cannot state that.

Q. Would it be more than 20 cubic feet per second, or wouldn't you be able to say?

A. No, I don't know offhand what its carrying capacity is.

Q. It is quite a large flume, isn't it? A. Yes.

Q. It is the flume that supplies the entire power plant at Sheep Creek? [574] A. Yes.

(Testimony of L. H. Metzgar.)

Q. Mr. Metzgar, have you had experience in irrigating soil with a view to getting water to soak into the ground? A. I have had some.

Q. How do you go about it when you want the water to soak into the ground?

A. Spread it over the ground so that it covers the entire surface of the ground.

Q. How do you arrange that?

A. On the mountains, in some places where the ground is pretty level, you level it off entirely and throw up ridges in blocks.

Q. That is what you call a check? A. A check.

Q. What do they consist of?

A. They are little dams to hold the water on the ground until it soaks in.

Q. They are little reservoirs? A. Yes.

Q. The ground is terraced, so to speak?

A. Yes.

Q. And the ridge is all around? A. Yes.

Q. How large are those checks?

A. Depends upon the different localities. If there is any slope they are practically pretty small, where the ground is upraised—where it slopes.

Q. The only way the water will soak in is to bring it to a standstill? A. Yes.

Q. If you have no such check and the water is turned loose in an alfalfa field what is the result?

A. Cuts a channel and the water runs through that channel.

Q. Does not soak into the ground? A. No.

Q. Can you irrigate a steep hillside like that at all? [575] A. No.

(Testimony of L. H. Metzgar.)

Q. Why couldn't you irrigate it?

A. The water would not stay there long enough to soak into the ground.

Q. Would a volume of water running down that hillside—a hillside of that character, no matter what the volume of water might be, large or small,—would that water have any tendency to cause a landslide? A. Not from saturation, no.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. If there were any cracks and the water was running over them it would go into the ground, wouldn't it?

A. It would go in an open crack, sure.

Q. How large did you say that flume was at Sheep Creek? A. 3 by 4.

Q. How large is the flume up on the sidehill?

A. I don't know that.

Q. It isn't nearly as big?

A. I think not from the evidence I have heard.

Q. You have never seen a penstock connected up with some arrangement to take care of any possible overflow, Mr. Metzgar, have you?

A. A penstock, yes, but not a diversion box like this was.

Q. You noticed they all called it a penstock—the engineers made the description strong enough on the map, didn't they—it says penstock, it doesn't say diversion box,—the engineers who made the map

(Testimony of Frank A. Metcalf.)

didn't know what they were talking about, did they?

A. Oh, I don't know about that.

Mr. RODEN.—That is all.

(Witness excused.) [576]

Testimony of Frank A. Metcalf, for Defendant.

FRANK A. METCALF, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Frank A. Metcalf.

Q. What is your profession?

A. Mining engineer.

Q. How long have you followed that profession, Mr. Metcalf? A. About 17 years.

Q. Are you familiar with the place that has been termed the Alaska Juneau penstock—where it was formerly situated? A. Yes, sir.

Q. Are you familiar with the slope of Mount Roberts? A. Yes, sir.

Q. Were you in Juneau at the time this landslide occurred on the 2d of January, 1920?

A. I was, yes.

Q. You had been here for some time prior to that? A. Yes, sir.

Q. What position, if any, did you hold with the City of Juneau at that time?

A. I was City Engineer.

Q. As such engineer did you have any occasion

(Testimony of Frank A. Metcalf.)

to go up there on that day? A. Yes, sir.

Q. At what time of the day was it?

A. As near as I can recollect, it was about 1 o'clock—in the neighborhood of that.

Q. About one o'clock in the afternoon following the slide? A. Yes, sir.

Q. That was the second of January, the day the slide occurred? [577] A. Yes.

Q. How did you go up there, Mr. Metcalf?

A. I went up the trail.

Q. That is the trail leading by the foundation of the administration building? A. Yes, sir.

Q. And where does that trail lead with reference to the point where the slide broke loose?

A. It leads right past the slide—right past the apex of the slide.

Q. Just above it? A. Just above it.

Q. And you followed that trail up to the penstock? A. Yes, sir.

Q. What condition did you find that trail in reference to wash and matters of that kind? I wish you would explain to the jury just how the trail was,—first, was there ice on the trail?

A. Yes, there was ice on the trail.

Q. On the bottom of the trail? A. Yes.

Q. Explain to the jury how that trail looked to you at the time you went up there.

A. It showed every evidence of water having run over the trail. The rocks were washed clean, and there was no dirt to speak of around the rocks on the trail; and where the water had short cir-

(Testimony of Frank A. Metcalf.)

cuted, you might say—that is, jumped across the trail, the grass was matted down, and sticks and leaves and things of that kind were lodged in the bushes.

Q. You could see that water had been running there?

A. Oh, yes, you could see that water had been running over there.

Q. Was there any appreciable cut or wash in the trail itself? A. No. [578]

Q. There was not? A. No.

Q. It was just simply a trail that was washed clean showing that water had washed over it?

A. That is all.

Q. At the point where the slide occurred, right above the place where the slide broke loose, did you see any evidence there where the water left the trail and spilled over there?

A. Yes, sir, you could see that the water had left the trail—there was a sharp bend in the trail and the water could not make the bend and it went over.

Q. At that point there was evidence, was there, of running water between the trail and the apex of the slide?

A. Yes; the grass was all matted down, smooth, flat.

Q. Was there any wash whatever there?

A. No.

Q. Any evidence of scour?

A. None whatever.

Q. After leaving the trail did you follow the course of the water clear up to the penstock?

(Testimony of Frank A. Metcalf.)

A. Yes.

Q. What evidence of running water did you find between the spout of the penstock and the point where the water had entered the trail?

A. The leaves and debris that had been spilled over from the trommel were washed around there, showing that the water had carried them with it as it went down the trail, was about all you could see.

Q. Was there any evidence of any cut or abrasion in the soil?

A. No, except in this pile—there was a pile of muck and leaves and sticks there that was washed down.

Q. I mean in the ground itself? A. No.

Q. There was no abrasion of the soil? [579]

A. None whatever.

Q. The soil was in its original condition?

A. Absolutely.

Q. The only evidence that water had washed over it was the fact that you could follow these leaves and stuff that had been taken by the trommel screen from the water, along down the course of the water? A. That is it.

Q. As you went up there that day, Mr. Metcalf, did you see any water coming from the Alaska Juneau flume at any point, walking along to the point where the snowsheds are—did you see any water at that point?

A. You mean coming from the flume?

Q. No, from the top of the flume?

A. There was quite a bit of surface water running down over the snowsheds, was all I saw.

(Testimony of Frank A. Metcalf.)

Q. Ran down over the snowsheds and then hit the top of the flume? A. Yes, and flowed over.

Q. How large a flow was that?

A. It was a pretty good-sized flow—there was quite a lot of water that day.

Q. To a person coming up Front Street and looking up there, where would the water appear to be coming from?

Mr. RODEN.—If you know.

A. Where would the water be coming from?

Q. You know where the water was coming down, don't you? A. Yes.

Q. You know it was surface water coming over the snowsheds and running down below?

A. Yes.

Q. Where did it appear to be coming from, from below?

A. Anyone that didn't know, looking up there couldn't exactly tell—you could tell it was coming from the top—you could see a sheet of water from the street. [580]

Q. But they couldn't tell where it was coming from? A. No.

Q. It would be a sheet of water shooting out over the flume? A. Yes.

Q. And that was the condition when you went up there that afternoon? A. Yes.

Q. Now, Mr. Metcalf, if a quantity of water, one, two or more sluice-heads of water, or even a larger quantity, were liberated at the point where this penstock stood and were permitted to flow down

(Testimony of Frank A. Metcalf.)

the hill, what, if any, effect would it have upon the soil on its way down if it ran for any length of time?

A. If it ran for any length of time it would naturally cut a channel for itself—it would find the water level in the quickest way.

Q. Would it have any tendency to cause a slide of the material on the hillside?

A. No, it wouldn't—it wouldn't have time—it would be going too fast.

Q. Going so fast it wouldn't have time to soak in, and that would be true regardless of the quantity of water coming down—regardless of how large the volume might be? A. Yes.

Q. And the length of time it might run?

A. Yes, sir.

Q. The longer it might run the deeper the channel would be? A. Yes.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. And it wouldn't make any difference how long this water was running through there at all, it never would have time to soak through?

A. Oh, yes, it would cut out a bank and the bank would cave in eventually—in a thousand years or so. [581]

Q. I understand you to say, Mr. Metcalf, that you know how the water coming from the snow-sheds would look to a man standing on Front Street—is that the way I understand you?

(Testimony of Frank A. Metcalf.)

A. I know how it would look to me.

Q. And that is all you do know, isn't it?

A. I don't know how it would look to anybody else, but I know the appearance it would have to me.

Q. If a man saw the water—suppose he were even mistaken and thought the water was coming out of the flume up there instead of over the snowsheds, could a man be mistaken also by mixing up the snowsheds with the penstock—could he also be mistaken and think that the water was coming out of the penstock when as a matter of fact it was coming from over here?

A. No, they couldn't be mistaken there.

Q. Is there a possible chance for this water from the snowsheds to get over here?

A. No possible chance.

Q. Where were you at the time of the slide, Mr. Metcalf? A. At the time of the slide?

Q. Yes.

A. I was at home at the time of the slide.

Q. Then I suppose you went down to the slide as quick as you could?

A. The Mayor called me up and asked me to go down.

Q. Did you go into the Goldstein store at all that morning? A. Not that morning, no.

Q. When did you go in there?

A. I was in there in the afternoon and evening.

Q. About what time in the afternoon?

A. I don't remember—it was late in the afternoon I know.

(Testimony of Frank A. Metcalf.)

Q. It was after one o'clock?

A. Oh, yes, it was after I come down off the hill.

Q. Was any water running through his store then? A. Quite a bit.

Q. Was that water coming from the snowsheds?
[582]

A. I couldn't tell where it was coming from.

Q. Was it coming from the snowsheds to the best of your opinion?

A. It was coming from the hillside behind.

Q. I am asking you if it was coming from the snowsheds?

A. I couldn't tell you if it was coming from the snowsheds.

Q. So you want to tell the jury now that you cannot tell whether this water that was running in the store down here was coming from here or from some other source?

A. No, I don't know where it was coming from.

Q. And you are a mining engineer, are you?

A. Yes.

Q. Here is a mountain-side and here is a hog-back coming down here, and it is impossible for that water to get over here, isn't it?

A. Yes, it is impossible for the water to get over there.

A. As a mining engineer you want to state to this Court and jury, do you, that you don't know whether that water was coming from the snowsheds or not,—that is your best professional opinion, is it?

A. I couldn't say it was coming from the snow-

(Testimony of Frank A. Metcalf.)

sheds. It was coming from the mountain-side—it was surface water that was coming down there.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Do you know which direction the spout points at the trommel screen?

A. It points pretty nearly west.

Q. Points up towards Mount Juneau?

A. Yes, sir.

Q. In looking at it from Front Street what view would you get of water spouting out of there, would you see the flat side of it or the edge of it?

A. You would see the edge of it. [583]

Q. How would it be with the water coming over the snowsheds—would you see the front side of that or the edge of that?

A. You could see the front side of that.

Q. You could tell the width of that? A. Yes.

Q. Could you see the width, or tell the width of a stream coming out of the spout? A. No.

Q. You couldn't tell the width of it? A. No.

Q. Is that the reason you give as to why a man couldn't be mistaken as to where the water was coming from?

A. Yes; because one was a sheet of water, and the other would be a spout of water.

Q. A spout of water running in the opposite direction? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Raymond F. Grefe, for Defendant.

RAYMOND F. GREFE, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Raymond F. Grefe.

Q. Do you know where the Alaska Juneau penstock used to be situated? A. Yes, sir.

Q. Were you up there on the day of the slide?

A. I was up there in the afternoon, of the day of the slide, yes. [584]

Q. About what time?

A. I would say it was about 1:30, as near as I can remember it.

Q. How did you go up, Mr. Grefe?

A. I went up those steps along by the buildings that were left, and then went up by the trail.

Q. And followed the trail up the hill?

A. Followed the trail right up to the penstock.

Q. Did you observe the condition of the trail as you went up? A. Yes.

Q. Was there any ice on the bottom of it?

A. There were patches of ice.

Q. What, if any, evidence of wash was there in the trail?

A. The gravel and the small rocks were washed out fairly clean.

Q. Was the gravel in the bottom of the trail washed out any—scoured?

(Testimony of Raymond F. Grefe.)

A. Not a great deal—not any more than any other trails *with* on a hillside like that.

Q. Not to any perceptible degree? A. No.

Q. That is, you would not be able to see it by looking at it? A. No.

Q. At the point right above the apex of the slide, where the ground had broken loose, did you see where the water had broken out of the trail?

A. That and two or three other places the water had cut out through a line over the grass.

Q. What evidence was there right above there—

A. The grass was matted down the way it always is when water runs over it, and there were sticks and things caught in the brush.

Q. Had the ground been washed out any there—any cut there in the soil?

A. No, I didn't notice any cutting at all.

Q. Then you went up the trail to the penstock?
[585] A. Yes.

Q. When you got to the penstock did you observe conditions there around the penstock where the water had been running?

A. I noticed, as Mr. Metcalf did—we went around the bottom of the penstock, and there was the trash and debris that had been washed out of the bottom of the trommel and had run down over the hillside.

Q. And by following that trash down you could see where the water had run?

A. You could see where the water had run until it hit the trail.

Q. Was there any cut or scour in the trail itself

(Testimony of Raymond F. Grefe.)

as the result of running water?

A. I didn't see any.

Q. If there had been would you have seen it?

A. I think I would, yes.

Q. You were there looking around for that purpose, weren't you? A. Yes.

Q. The ground was in its natural condition except for the fact that the leaves and stuff had been scattered all over it?

A. The leaves had been washed down.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Are you a mining engineer, too? A. No.

Q. You are a brother-in-law of Frank Metcalf's, aren't you? A. I am.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) You were with Frank Metcalf on the occasion that he went up there?

A. I went up with Mr. Metcalf, Mr. Johnson, Mr. Warner, and Mr. Richards, I believe.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [586]

**Testimony of P. R. Bradley, for Defendant
(Recalled).**

P. R. BRADLEY, recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

(Testimony of P. R. Bradley.)

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You have already been sworn, Mr. Bradley?

A. Yes, sir.

Q. Where a landslide occurs, does it occur suddenly or slowly?

A. All the ground I have ever seen slide, slides by slow progression. Large masses of ground that have been known to move are recognized by geologists and given the terms of creeps. A large area that is under motion is called a creep; and that is a good word because it expresses more or less the way in which ground moves. When it starts to work or get in motion it creeps along by a series of let-goes, you would say, until the final collapse, when it goes.

Q. And those let-goes produce a series of short jerks? A. Yes.

Q. I wish you would explain to the jury just how that ground works and how it moves.

A. If a piece of ground is going to move at all it is because the resistance of that ground, the force to keep it from moving, is not as great as the forces that are at work to make it move, and the forces that are at work are constantly—they are always pulling—that is to say, gravity; and gravity will put a steady pull on a piece of ground, and that pull will be so strong that a weak point will yield, and after that weak point yields there will be a period of rest until the constant steady pull overcomes the next weak point, and so on,

(Testimony of P. R. Bradley.)

progressively, until so many weak points have been overcome that the whole mass collapses and falls down.

Q. And in cases where the ground slides on slopes like this here, where the ground slid behind the Koski house, would the action be sudden or progressive, as you have indicated? [587]

A. It would be progressive up to the point of collapse, and that, of course, would be sudden.

Q. And how long, in your opinion, would it require that kind of a mass to gain momentum—that is, how long would it require a mass to get to that point before it would collapse?

A. That is a very difficult thing to say. A mass may work for a very considerable length of time, but from the time that the movement is perceptible until the final collapse might be a matter of hours, might be a matter of days, might be a matter of months.

Q. When the mass comes down the way the evidence in this case indicates, extending from the toe of the Koski cut up the hillside,—how long was this chunk that broke down, Mr. Bradley,—can you tell from the map how long it was?

A. That looks to me as if it would scale about 150 feet.

Q. When a chunk of that kind slides is there any particular place along that whole 150 feet where it commences?

A. No, no, I think not. The first yielding of course is at the weakest point—nobody knows where that is.

(Testimony of P. R. Bradley.)

Q. The whole mass moves at one sitting?

A. Yes; the force of gravity is working throughout the entire mass, and the minute gravity takes possession of the mass—that is to say, gets in motion at all, it is moving the whole mass.

Q. Now, would the movement that you have spoken of as occurring some time prior to the final collapse be evident to persons looking at the face of the cut—would it be perceptible then?

A. Oh, yes; the first perceptible thing would be a crack forming around the upper limit of the ground that is in motion.

Q. The first perceptible thing would be the crack that would form at the upper end?

A. Yes; a man who was taking a bird's-eye view of the whole thing, that is what he would see.

Q. But a man standing at the cut—at the excavation behind the [588] Koski house, would it be a perceptible motion of the mass looking into the face of the cut?

A. The first thing he would see would be some strains in the bank—that would be by pieces sloughing off—it would be under compression and naturally pieces would begin to fall away.

Q. But there might be a crack above before there would be any evidence below?

A. Yes, that would be quite possible.

Q. Is there any evidence at the present time on the hillside of any slide? A. There?

Q. Where?

A. At the point on the hillside immediately across

(Testimony of P. R. Bradley.)

Lower Franklin Street from the house called Robert's row.

Q. How far up the hill does that extend?

A. Well, 150 or 200 feet.

Q. I wish you would explain to the jury just what there is at this particular point at the present time to illustrate what you have said.

A. At this particular time there is a very large mass of ground that is in motion and which has become evident in the last few days; and the upper side of the ground that is in motion is somewhat the same shape—the same outline, as the slide area marked on the map with the exception that the curve is a little broader—the sides are not so parallel; but the crack is decidedly pronounced until it disappears on the lower side and cannot be seen; but at the back end the crack is about a foot wide, and if my two hands represent the slope of the hill, or are parallel with the hill, where the crack has appeared, the ground in front has dropped 4 feet. The drop has not been so great around the entire perimeter of the crack, but right in the middle of the back the drop is about 4 feet and the forward movement is about a foot. [589]

Q. The crack there is practically 4 feet wide?

A. No; the drop is 4 feet, so if a man stands in front of it the first thing he sees is a fresh bank.

Q. Standing looking at it from the front it would appear like a crack 4 feet wide, when as a matter of fact it is only a foot wide—is that the idea?

A. No, he would see where the ground had

(Testimony of P. R. Bradley.)

dropped down and he would see a fresh bank 4 feet high, but he would not see the width of the crack at all because the ground is so flat. If the ground were steeper he would be able to see the width of the crack, but at this particular place the ground is so flat the width of the crack is not perceptible until you are over it.

Q. What is the size of the mass that is moving there at the present time?

A. It is a very large body of earth—I would say it is 150 to 250 feet down to the street and perhaps 250 feet along the street.

Q. The entire mass is at the present time in motion?

A. The entire mass is at this time in motion.

Q. What is the cause of that mass letting go?

A. It is the force of gravity working along the elastic curve.

Q. Where does the elastic curve start from that?

Mr. RODEN.—I don't care to object, your Honor, but it seems to me we are wasting a good deal of time by going all over the elastic curve again, etc. Counsel said he wanted to ask the witness a question of two.

The COURT.—What are you talking about now, Mr. Hellenthal? Do I understand that the testimony is directed to some slide—

Mr. HELLENTHAL.—No, it isn't this slide—it is a new slide that started yesterday.

The COURT.—That is what I mean. It isn't the slide in question?

(Testimony of P. R. Bradley.)

Mr. HELLENTHAL.—No, it isn't the slide that happened that day. It is merely illustrative of Mr. Bradley's statement of how [590] the ground starts, and we will follow this up with evidence that there was an excavation the entire width of it, and show how the ground works along the line of the elastic curve—just as the other witnesses have testified—so that the jury, if they wish, can go up and see it.

The COURT.—All right, but be brief about it.

Q. What is there in the way of an excavation in front of this mass?

A. The most of those buildings along the upper side of the street are set in a small excavation.

Q. And there is an excavation extending practically along the entire width of the mass that is moving? A. Practically, yes.

Q. Have you examined this entire mass to determine whether the entire mass is moving or not?

A. I have been over most of it. I have been over enough of it to tell me that the whole mass is in motion—that is my judgment from what I have seen.

Q. And in front where the buildings stand, has the ground shifted in there any?

A. No, it has not.

Q. That is, not perceptible? A. No.

Q. Not visible yet?

A. No. Immediately behind the buildings there are bulkheads, and it appears to me that those bulkheads have been inclined a very little forward.

Q. They ultimately will have to go?

(Testimony of P. R. Bradley.)

A. If the bulkheads are strong enough to withstand that weight they can hold it, but if they are not they will go. I don't know what is going to happen there.

Q. Now, Mr. Bradley, that mass has been moving for several days, I believe you said?

A. I understand so; yes.

Q. Now, when a slide happens, as you have indicated behind the [591] Koski house, and the ground is soaked with water from rain and melting snow so that it is well saturated, what evidences occur when the ground begins to move?

A. Well, the first movement of the ground naturally is the compression.

Q. Explain that term to the jury, just what you mean.

A. Well, if you have a mass of ground that is in motion from the upper side to the lower side yet the most of the motion is on top and there is no motion at the bottom, it simply means that a certain mass of ground is beginning to occupy less space—it is crowding itself together, and naturally in that case if the ground were saturated with water before this compression began some water would have to be pressed out,—it would be just like squeezing a sponge.

Q. It has a squeezing effect?

A. It has a squeezing effect; yes.

Q. And any mass in motion would have more or less of that depending upon the—

A. Depending upon the velocity. Of course after

(Testimony of P. R. Bradley.)

it once broke loose in final collapse everything would be free.

Q. Where would that water become evident?

A. It would become evident wherever the squeezing would be greatest, and in my opinion it would be down near the foot.

Q. In this particular case, speaking of the Koski slide, where would the water be visible?

A. Wherever the water was squeezed out of it, and that would be near the bottom; but wherever the water came from, it would run over the front of the slide area.

Q. It would squeeze out of the lower part of the ground across the entire width of it?

A. Naturally, yes.

Mr. HELLENTHAL.—That is all. [592]

Cross-examination.

(By Mr. RODEN.)

Q. Then you want to tell us, Mr. Bradley, that there must have been a terrible squeezing to get a couple of sluice-heads of water out of this mass; is that the idea?

A. I don't know how much water came out.

Q. You don't know very much more about that proposition than any other roughneck, do you?

A. That is a matter that anybody ought to know about.

Q. Anybody who has any ideas at all knows that a little water is coming down that sidehill?

A. Oh, yes, they ought to know it.

Q. And after a stream of water has been over

(Deposition of P. R. Bradley.)

it we all know there is probably a little more water in there? A. Oh, yes, there would be more.

Q. You don't pose here as an expert on slides, Mr. Bradley, do you?

A. Only to the extent that I have some knowledge of the mechanics of those things.

Q. You have thought a little about these things, haven't you? A. Yes.

Q. If the ground breaks on top and begins to move, it doesn't matter—that dirt has got to go somewhere, hasn't it?

A. Oh, my opinion about that is that the first result is a compression, and then the ground occupies less space.

Q. Certainly it does; sure. You couldn't compress, under the circumstances as they existed here—there couldn't have been such a terrible compression; in other words, that the ground could get so worked together that it occupied very much less room than it did a moment before this compression took place?

A. I would say, yes; because in this slide I have just spoken of, there has been quite a considerable opening on the upper side, and the ground below occupies a space less than it did before.

Q. Then it simply compressed itself, but you said there was a bulkhead to hold it, but on the Koski lot there was nothing [593] to hold it back, and the compression that started up on the hill—you don't want to tell this jury that the cut was there and it began to press up this way, and pressed it

(Deposition of P. R. Bradley.)

so as to get out all that water that you talked about, and that it spouted directly at this cut—is that what you want to say?

A. That would be my judgment—that is the way it would act, yes, up to a certain point.

Q. A man down here couldn't see anything at all—it would stand perfectly still, but up here it would all be breaking away, and not moving anywhere but simply compressing itself; is that the idea?

A. The man down below might not see any forward movement.

Q. What was that pressing against—what held it at that cut—what held it from going over the cut there?

A. Naturally the thing that held it was the friction on the bedrock.

Q. Wouldn't the friction on the bedrock be over the whole of it—this compression?

A. Ultimately; yes.

Q. The friction was overcome on the bedrock up there on top where the break has occurred, wasn't it? A. Oh, yes, sure.

Q. But down here where poor Koski's place was, the bedrock would act differently?

A. No; that is the way those things come—progressively.

Mr. RODEN.—That is all.

(Witness excused.) [594]

Testimony of John Bendel, for Defendant.

JOHN BENDEL, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. John Bendel.

Q. What is your profession?

A. Mechanical engineer.

Q. As such mechanical engineer do you occupy any position with the Alaska Juneau Company?

A. I do.

Q. What is your position there?

A. Designing new work, and attending to construction.

Q. Engineer of construction? A. Yes, sir.

Q. Do you remember the time when the trommel screen was installed in the penstock that has been referred to in this case? A. Yes.

Q. Under whose supervision was that installed?

A. Well, it was installed under Mr. Bradley's supervision, of course, after he approved the plans, naturally.

Q. You prepared the plans? A. Yes.

Q. You were the engineer of construction that had charge of that work? A. Yes.

Q. This model offered in evidence here, that is a model of the screen, isn't it? A. It is.

(Testimony of John Bendel.)

Q. The screen as it originally was?

A. Yes, just the size.

Q. Now, as part of your profession, Mr. Bendel, have you installed [595] screens of that type?

A. Yes.

Q. And have done so for many years, I believe?

A. Oh, yes; in all metallurgical plants screens are used to a very large extent.

Q. You have installed how many of those screens, would you think?

A. I couldn't exactly remember—about a dozen—we use them around milling plants.

Q. A good many, anyway? A. Oh, yes.

Q. And have had experience in the construction of penstocks and matters of that kind?

A. Oh, yes, yes.

Q. Now, Mr. Bendel, this screen was driven how?

A. Driven by an electric motor.

Q. How much power did it require to drive that screen? I mean how much was absolutely necessary to drive it?

A. Well, to make a rough guess at it, it shouldn't require actually more than about a horse-power.

Q. How much did you indicate for the screen at the time the screen was put in?

A. Well, at that time I consulted with the electrical department and they told me the only thing they had available at that time was a 3 horse-power motor, and I said, "Well, put it in, then."

Q. That size motor was not necessary?

A. No, that size was not necessary.

(Testimony of John Bendel.)

Q. A one horse-power motor would have been large enough? A. Yes.

Q. At the time of the installation I believe you said they had a 3 horse-power motor on hand and that was installed temporarily? A. Yes, sir.

Q. And then afterwards was another motor installed? [596]

A. No, a 3 horse-power motor was used there right along, I understand. Formerly the motor was a 3 horse-power, but it was on a different circuit.

Q. After the construction work was completed the matter was turned over to the electrical department? A. Yes.

Q. And then you had nothing further to do with it? A. No.

Q. And your recollection of what happened after that is not clear—that is not within your department? A. No, I would not care to tell about it.

Q. How was that screen set in motion by the motor?

A. That screen was driven by an electric motor, and a belt run over a pulley, and this pulley in turn drove through two pairs of gears, and the last gear was attached to the screen shaft proper.

Q. As long as this screen was in motion was there any chance for any water to run over it and out of the discharge spout?

A. No, it wasn't possible at all, because the screen is of such large proportions that it was absolutely impossible for any water to get over as long as the screen was in motion.

(Testimony of John Bendel.)

Q. And if it was in motion and if the water was clear, would there be any chance of water running over it?

A. If the water was clear there was none, no.

Q. And the chances of running over would depend upon the amount of debris and the volume of the water? A. Exactly, yes.

Q. You don't know anything about the electrical department, I suppose, Mr. Bendel?

A. No; you would get better information from the electrical department.

Q. This screen, Mr. Bendel, was that a safe and proper appliance for a case of that kind,—how does that compare with other devices? [597]

A. Well, it is a developed type, if you may say so. A stationary screen is a screen in its crudest form, and when it became necessary to have something more reliable the revolving screen was developed.

Q. It is an improved method of screening the water? A. Yes.

Q. And is the best method known for that sort of place? A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. They have a flat screen at the present time, haven't they?

A. Yes, a stationary screen—yes.

Q. As I understand you, Mr. Bendel, there was

(Testimony of John Bendel.)

a belt from the motor? A. Yes.

Q. To a pulley? A. Yes.

Q. And the pulley is connected with two sets of gears? A. Yes.

Q. And the gears, are they fitted to the shaft of the screen?

A. Yes; that is, the fourth gear was attached to the screen shaft.

Q. And it was operated by a 3 horse-power motor? A. 3 horse-power motor.

Q. Suppose the screen became overloaded, what happened? A. Overloaded with what?

Q. Well, with debris?

A. I don't think it would make any appreciable difference at the speed the screen was running, because the screen was running so slow. The speed, that means the horse-power would increase only in proportion to the speed, and anything you could put in that thing wouldn't make any appreciable difference, I don't think. [598]

Q. Would it make it go any slower?

A. No, it couldn't slow up.

Q. Couldn't?

A. No, it couldn't, because the motor couldn't slow up—it is impossible, you know,—something else would have to happen.

Q. And that is the screen that is used in all mills?

A. Yes, it is used for all screening purposes—rock, sand, gravel—for instance, dressing water as we had it in the mill—for any purpose where screenings are required.

(Testimony of John Bendel.)

Q. If the motor stopped, or anything happened to the belt or to the gears—let me ask you this question first—if the motor stopped, how would it be started up again?

A. Well, by throwing the switch, of course.

Q. That is, somebody would have to walk over to the trommel house?

A. Yes, I suppose so—that means, provided the original switch was there, but I don't know what changes have been made, Mr. Roden, later on.

Q. The way you installed it, it provided for starting it at the penstock?

A. Well, I didn't make any provision, at all, Mr. Roden, because that is up to the electrical department pure and simple.

Mr. RODEN.—That is all.

(Witness excused.) [599]

Testimony of Victor C. Clauson, for Defendant.

VICTOR C. CLAUSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Victor C. Clauson.

Q. What is your profession?

A. Metallurgist.

Q. What position do you occupy with the Alaska Juneau Company as a metallurgist?

(Testimony of Victor C. Clauson.)

A. Mill superintendent.

Q. How long have you occupied that position?

A. All the time, with the exception of one year when I was assistant, since the mill started.

Q. Are you familiar with the conditions about the Alaska Juneau mill as they were at the time of this slide? A. Yes.

Q. You were then mill superintendent?

A. I was.

Q. And had been for some time prior to that?

A. I had.

Q. And are you familiar in a general way with the diverting system by which the water is diverted and conveyed to the mill? A. I am.

Q. And had been familiar with that for some time prior to the slide? A. Yes.

Q. Mr. Clauson, what is the size of the mill tank indicated upon this map?

A. Twenty-five feet in diameter and 20 feet high.

Q. The elevation at the sides above the ground is 20 feet?

A. Yes, sir; there is approximately a foot and a half that is cut down of the height of the tank for an overflow. [600]

Q. The height of the tank at the overflow is 20 feet from the ground?

A. Why, the tank is 20 feet high, but practically a foot and a half is cut away for the overflow.

Q. What device have you for the overflow?

A. We have an overflow flume.

Q. Where does that water go?

(Testimony of Victor C. Clauson.)

A. To the tailings flume.

Q. How does the water get into this tank?

A. Though this system over from the tunnel—

Q. What devices have you to supply this tank with water?

A. From the channel and Gold Creek.

Q. You have two ways of getting water?

A. Yes, sir.

Q. Now, how do you get the water from the channel? A. Pump it.

Q. Salt-water pumps? A. Yes, sir.

Q. They were there at the time of the slide, and always have been? A. Yes, sir.

Q. What is the other source of supply you have?

A. From Gold Creek?

Q. That is— A. Fresh water.

Q. That is the system that has been referred to in this trial before? A. Yes, sir.

Q. That water coming from Gold Creek comes in how?

A. Through a flume and ditch, and then through a pipe-line.

Q. Has that pipe-line got any valve in it?

A. Yes, sir.

Q. Where is that valve situated?

A. In the mill.

Q. How is that valve operated?

A. By a wheel. [601]

Q. Can anybody go up there and operate that valve?

(Testimony of Victor C. Clauson.)

A. Indeed not, no, sir; it is chained with a Yale padlock on it.

Q. How long has that lock and chain been on there? A. Since it was installed.

Q. And there is a Yale padlock on it?

A. Yes, sir.

Q. So that it cannot be operated by anybody?

A. No, sir; not without breaking the valve, and then they cannot operate it.

Q. Who carries the key to that valve? A. I do.

Q. Can anybody get that key?

A. No, sir, except when I turned the key over to someone, and then I would have to go down with him and help him to close the valve.

Q. You never lose sight of that key?

A. No, sir.

Q. That valve is put in there for what purpose?

A. In case of an accident, or we want to cut off the water from the city fire protection system; or if anything should happen out in that system and we would still want to run the mill, or any emergency should arise outside, we can get the salt water, or we can divide the two.

Q. That can be done if it is absolutely necessary?

A. Yes.

Q. Did such an emergency arise within the last day or so? A. It did.

Q. When? A. Last night.

Q. What was the emergency?

Mr. RODEN.—We object to that—we don't care

(Testimony of Victor C. Clauson.)

what happened last night in the way of any pipe-line.

The COURT.—Objection sustained.

Q. Anyhow, that is the purpose of the thing?
[602] A. I closed it last night, yes.

Q. It is ordinarily kept open so there is a hundred per cent run through the pipe?

A. Yes, sir; but we also must keep it locked when it is closed. When it is closed it is locked closed, and when it is open it is locked open.

Q. It is locked in any event?

A. In any position it is in it is locked.

Q. And it cannot be either closed or opened except by you? A. No, sir.

Q. When the water is running through the fresh water flume in what position do you keep it, opened or closed? A. Open.

Q. Open—always open, is that right?

A. Yes, sir, always.

Q. I wish you would explain to the jury the necessity, if any exists, for keeping the flow of the water at the mill tank steady and the pressure equal.

A. Well, on the ball mill floor, which is the floor we have the lowest pressure on—that is the floor which is on the level with the tank, the valves are set there at a certain point for feeding the mills for certain tonnages, and if the tank goes down the pressure immediately changes and changes the volume of the flow, and if the tank should go down almost empty we would have choke-ups on every

(Testimony of Victor C. Clauson.)

laundry there, and there would be spill-overs on the floor, and we would have what we call a mess.

Q. The tank could have quite a volume of water in it and still that condition could arise?

A. Certainly.

Q. Proceed.

A. The next condition is on our concentrating tables, where we have an even adjustment on our valves,—they are set to such a point where the dressing water will just wet the [603] linoleum—the dressing water is not for the purpose of washing in any way—it is just for the purpose, in our case, of keeping the linoleum wet and the lead sulphides wet so they don't dry and float off. A few feet of pressure in the tank—a difference in pressure, will cause a change in these valves, which are set to a very fine point.

Q. What results when that occurs?

A. Why, the man has to adjust the valves again—we have very long tables, so we couldn't have such a thing occur.

Q. What results with reference to a loss, if anything, in the mill if the pressure goes down—if any loss results?

A. Our sulphides, particularly our lead, which any of us know, will float if they get dry unless you keep them—the lead sulphide floats very easily—you can float them just by surface tension alone, and that is what carries our gold. All our gold is associated with our lead sulphides. If we are losing lead sulphides we are losing gold. That is

(Testimony of Victor C. Clauson.)

why it is absolutely essential that we keep our lead wet.

Q. A shut down in the water results in what?

A. First and primarily it results in a choke-up of the laundries all over the mill, and as that occurs, as the pressure goes down, it also results in a loss of values in our concentrating department.

Q. To what extent would you loss values?

A. Well, if it went dry our loss would be very great.

Q. Great and small doesn't tell us much, Mr. Clauson.

A. Proportionately great to what our values are. Our values can be spoken of as—

Q. As measured in dollars what kind of loss would it be?

A. Well, if the whole thing went—

Q. How is that?

A. I would rather express it in percentage of value.

Q. All right, express it that way.

A. Well, if we allow our tables to run dry I would say that [604] at least 25 per cent of our recoverable values are lost, in addition to our tailings, and that is progressive as it goes down from floor to floor.

Q. What do you mean by it being progressive as it goes down?

A. Well, the first table or first class of concentrators would lose one percentage, the next class, on the next floor would lose another percentage,

(Testimony of Victor C. Clauson.)

and the next table on the next floor would loss another percentage.

Q. And how large a total would be lost by the time you got through the entire works?

A. That would be hard to say—I would say at least 25 per cent of the value.

Q. At least 25 per cent? A. Yes.

Q. Now, in order to prevent that situation and keep the pressure steady what, if any, devices have you installed, and did you have installed on the 2d of January, 1920, at the mill tank?

A. We had—first, on the gage itself, or on the board on which the footage of the tank was painted, we had a green and a red light; when the tank was full the green light was on, when the tank went down 3 feet a red light would light, and also make a contact with a mercury trap and would ring a bell and also light a big cluster of red lights on the ball mill floor.

Q. And that red cluster is on the ball mill floor?

A. It is now.

Q. I am speaking of that time.

A. The first thing that would go on would be a red light—

Q. I say I am speaking of January, 1920?

A. So am I.

Q. What did you have then?

A. We had a red and green light at the gage in the mill.

Q. The gage was in the mill? [605]

A. Certainly.

(Testimony of Victor C. Clauson.)

Q. And the red and green light indicated the height of the water in the tank?

A. Only to the extent of this, if it is full and overflowing the green light is on; if it goes down 3 feet the red light came on, in addition to making an electrical contact with this other arrangement which was on the ball mill floor.

Q. What was on the ball mill floor?

A. That would ring a bell and also light a cluster of red lights.

Q. It would ring a bell and light a cluster of red lights which were on the ball mill floor? A. Yes.

Q. What kind of a bell was that,—how much noise did it make?

A. Could hear it almost all over the mill.

Q. So if the water in the tank fell 3 feet below the overflow point a red light would flash on at the gage in the mill, a cluster of red lights would flash on at the ball mill floor, and a bell would ring that you could hear all over the mill?

A. At the lower part of the mill where the water is used.

Q. So that you would be notified instantly?

A. Yes, sir.

Q. If the flume should break, or the water spill over at the trommel screen, or anything should happen—any accident happen on the flume line above, would those lights and that system of signalling indicate anything to you? A. Why, certainly.

Q. They would indicate that something had happened?

A. We would immediately know,—the overflow

(Testimony of Victor C. Clauson.)

would stop or diminish, and if it stopped we would immediately be notified by these contrivances which we had erected and installed there.

Q. If there was anything wrong you would be immediately notified by these contrivances that you have installed, and then [606] you would look for it?

A. Yes, or have somebody else look for it.

Q. Now, during the several days prior to the slide how did you get your water supply for the mill? A. From the channel.

Q. Got it from the channel? A. Yes.

Q. By means of your salt-water pumps?

A. Yes.

Q. Were you getting any fresh water on the 1st of January? A. No, sir.

Q. Were you getting any fresh water the day before that? A. No, sir.

Q. There was no fresh water in your flume at all during those two days?

A. I wouldn't say at all—

Q. I mean for the mill.

A. No, not for the mill.

Q. The mill was not getting any water?

A. No, sir.

Q. Now, on January 2d, the morning of January 2d, how were you getting your water supply?

A. From the channel.

Q. From the channel by the means of your salt-water pumps? A. Yes, sir.

Q. How long did that condition continue?

(Testimony of Victor C. Clauson.)

A. I shut down the salt-water pump at 9:45.

Q. At 9:45 why did you shut down the salt-water pump?

A. Well—do you wish me to state what happened prior to that time?

Q. All right, tell what happened prior to that.

A. Well, in the morning Mr. Richards inquired how much water I required to run the mill, and I told him I was running one pump, or 3000 gallons, and he said he was going to try [607] to turn in fresh water—

Mr. RODEN.—Never mind what he said.

Q. What did you do? You understand, Mr. Clauson, that conversations between you and Mr. Richards generally speaking are not competent evidence except where they are explanatory.

A. I can hardly make myself plain without saying—from deduction I can say what he did, is that proper?

Q. Yes, that is proper as far as you know.

A. Well, shortly after 8:30 he came through the mill and told me that he had turned in fresh water and for me to look out for it, the equivalent of one pump.

Q. What was the equivalent of one pump?

A. Three thousand gallons a minute.

Q. Do you know how much that required at the regulating gate? A. No, I do not.

Q. Do you know how much Mr. Richards turned in at that time? A. I know what he said.

Q. Have you any personal knowledge of it?

(Testimony of Victor C. Clauson.)

A. No, sir; that is outside of my jurisdiction.

Q. Anyhow the amount of water you required was 3000 gallons? A. Yes, sir.

Q. About that? A. Approximately.

Q. How long does it take the water to get down from the regulating gate?

A. I have known it to reach us in less than an hour and 15 minutes, and I have known it to take an hour and 45 minutes, depending on the volume which is turned in.

Q. You got a little water pretty soon?

A. Yes, but not the full volume.

Q. It takes probably an hour or an hour and a half to get the full volume? A. Yes, sir.

Q. That morning while you were waiting for the water to come [608] what, if anything, did you notice in the way of electrical flashes on the hill-side?

A. My office faces the channel, and at 9:25 the voltage went low and I also saw a slight flash outside of the window; at 9:35 there was an exceedingly bright flash, like a bolt of lightning, and I immediately started to investigate because two of our motors kicked out.

Q. Two of your motors kicked out as a result of the flash?

A. Yes, sir; and I started down towards the power plant,—that is where the flash—well, it was similar to a bolt of lightning, is what it was similar to, and the only place I could think of that would cause anything like that was the power plant, so I

(Testimony of Victor C. Clauson.)

started down for the power plant, and I met Mr. Richards in the shed coming up, and he saw the same flash in the shed, and he assured me that it came out of the west, that it wasn't in the power plant—that the flash came from the west, was what he figured.

Mr. RODEN.—Never mind what he figured. Tell us what happened, if anything—what you know. A. I know that.

Mr. RODEN.—You don't know what he figured.

Q. (Mr. HELLENTHAL.) Then where did you go, Mr. Clauson?

A. We examined the lines and there was nothing we could see wrong with the Gastineau lines, and I suggested that it might be on the direct current return; we stepped out on the east side then and examined that and there was nothing there, so we came back to my office.

Q. Did you see another flash after that?

A. Yes, sir; at 9:45 was another flash but not nearly so bright as the other one—the one at 9:35 was by far the most severe or intense.

Q. There was a small flash, then, and then a large flash, and then that was followed by a smaller one?

A. Yes, sir.

Q. That is the way it appeared to you? [609]

A. Yes, sir.

Q. When the second flash occurred two of your motors kicked out? A. Yes, sir.

Q. Did any of your motors kick out at the time the short flash occurred?

A. No; we lost another motor at 10:20 though.

(Testimony of Victor C. Clauson.)

Q. You didn't observe any flash, however, at 10:20? A. Except the voltage went down.

Q. I know the voltage went down but you didn't observe any flash on the outside? A. No, sir.

Q. When, if at all, did you shut off the salt-water pump?

A. Immediately upon coming into the office—while we had been out there looking over the D. C. return, I figured that there was enough overflow to shut down the salt-water pump—the overflow had increased considerably since I had looked at it the last time.

Q. There was enough overflow at that time to shut off the salt-water pump? A. Yes, sir.

Q. What did you do—did you shut it off?

A. I did.

Q. Did you have it on again that day?

A. No, sir.

Q. From that time on where did you get your water supply to run the mill?

A. From Gold Creek.

Q. How was the overflow at the time you shut the pump off?

A. We had a little more overflow than what the salt-water pump gave us—just a little.

Q. From then on during the forenoon what, if anything, did you have in the way of an overflow?

A. As soon as these two motors were kicked out I opened an equalizing valve,—we have three in the mill, and instead of [610] letting this overflow become too great and splash over the tailings flume, we open these equalizing valves and allow it to go

(Testimony of Victor C. Clauson.)

in back of the tailings flume—allow it to come in at the head of the tailings flume, so as not to create too much disturbance where the overflow comes in.

Q. The overflow gets too big?

A. Yes; whenever it gets too big we open these equalizing valves which allow it to go to the head of the flume.

Q. When the two motors kicked out the overflow got so big— A. Yes.

Q. That you equalized it with your equalizing valve? A. Yes.

Q. Did you still have an overflow? A. Yes.

Q. During the forenoon what, if anything, did you have in the way of an overflow?

A. At 10:20 I opened the release valve and I sat in the office from that time on until 11:15.

Q. What was the condition with reference to overflow during that period?

A. It remained constant, and our water consumption remained constant from 10:20.

Q. Your requirements at 10:20 were regulated by your release valve, and after that your flow was exactly the same until after 11 o'clock?

A. As was apparent to the eye, yes, sir.

Q. As near as you could see? A. Yes, sir.

Q. There was a constant overflow?

A. Yes, sir.

Q. No shortage of water? A. No, sir.

Q. All right. Now, what happened shortly after 11 o'clock, if anything? [611]

A. All of our motors kicked out.

Q. All of your motors kicked out?

(Testimony of Victor C. Clauson.)

A. All of them.

Q. Every one of them?

A. Every one of them.

Q. The entire mill shut down? A. Yes, sir.

Q. Did your lights go out at that time?

A. Our lights went very low, but came back and remained on for approximately between 5 and 10 minutes, and then they went out.

Q. Then what happened?

A. Then they went out.

Q. From then on everything was out?

A. Yes, sir.

Q. That was about what time in the forenoon?

A. My records show that the motors kicked out at 11:15 by my time.

Q. At 11:15? A. Yes, sir.

Q. And the lights went out 5 or 10 minutes later?

A. Yes, sir.

Q. That is by your time? A. Yes, sir.

Q. How did your time compare with the regular time?

A. It is pretty close. We regulate by our regulator, but we are usually 5 minutes ahead of Treadwell time.

Q. Now, Mr. Clauson, after the motors kicked out and the lights went off, what, if anything, did you get in the way of a telephone message?

A. Sometime later—15 or 20 minutes later, possibly—I received instructions from Mr. Richards to proceed to the trommel screen and see what was going on there.

Q. Did you do so? A. I did. [612]

(Testimony of Victor C. Clauson.)

Q. How did you go?

A. I went up through the mill and caught the motor—the motor was just pulling out.

Q. When you got to the trommel screen,—will you indicate on the map how you proceeded—your route?

A. Along the main tram from the mill.

Q. From the mill you went through the tippie?

A. Yes, sir.

Q. And reached the main tram? A. Yes, sir.

Q. Then you took the train there and ran down to where you got off the train at the new portal?

A. Yes, sir.

Q. And then you walked over, is that right?

A. Yes, sir.

Q. Now, upon reaching the trommel screen what did you find?

A. I found that water was running through,—it had stopped—the juice was off.

Q. In what direction was that water spouting?

A. This way, parallel to the tunnel.

Q. In the direction of Mount Juneau, or in the direction of Front Street?

A. Parallel with Mount Juneau.

Q. That is the way the spout is situated?

A. Yes, sir.

Q. What did you do?

A. I turned it over—gave it a half revolution and stopped the water immediately.

Q. You gave it half a revolution by hand?

A. Yes, sir.

(Testimony of Victor C. Clauson.)

Q. Did you find any sticks or anything holding it?

A. No, sir; the holes were choked with moss.

Q. The holes were choked with moss and you gave it a turn and the water went through it?

A. Exactly. [613]

Q. And you turned it by hand? A. Certainly.

Q. Did it turn hard or easy? A. Easily.

Q. There was nothing there to keep you from turning it easily? A. No, sir.

Q. Turned pretty nearly as easily as this thing turns in the socket where it stands now?

A. I think it turned easier because it had babbitted bearings and they were greased.

Q. It had babbitted bearings which were greased and it turned easier than this screen now turns if you handle it by hand—this screen that is in evidence?

A. I would say so.

Q. After you turned it what happened to the overflow from the spout?

A. It immediately stopped.

Q. The overflow from the spout immediately stopped and the water went through the screen?

A. Yes, sir.

Q. Then what did you do—where did you go?

A. I stepped back into the change room—I had given Nordling instructions—

Q. Who was with you at that time?

A. Mr. Nordling.

Q. Who is Mr. Nordling?

A. An electrician.

(Testimony of Victor C. Clauson.)

Q. Where did he join you?

A. He was on the train when I jumped on.

Q. He was already on the train when you got there? A. Yes, sir.

Q. And on his way to the trommel?

A. Yes, sir.

Q. You and he went down there together?

A. Yes, sir. [614]

Q. All right. What, if any, instructions did you give Mr. Nordling at that time?

A. I directed him to get juice on the line so that the trommel screen could be turned over and kept revolving.

Q. Then where did Mr. Nordling go?

A. He went to the tippie-house to the telephone.

Q. And he telephoned at the tippie-house,—by the way, when you and Nordling were there the power was off? A. Yes, sir.

Q. There was no power at the trommel?

A. No, sir.

Q. Then you went where?

A. I stepped back into the change room, just simply to look around and wait until he came back.

Q. While you were in the change room there whom, if anybody, did you meet?

A. Mr. Richards.

Q. Then where did you and Mr. Richards go, if anywhere? A. Went down the trail.

Q. Went to the trommel? A. Yes, sir.

Q. While you were at the trommel, Mr. Clauson, what, if any, examination did you make of the ground in the vicinity of the spout?

(Testimony of Victor C. Clauson.)

A. We gave what we thought was a thorough examination. We took our time about it, and it was our business to find out as much as possible about the character of that ground.

Q. What did you find in the way of evidences that water had been running there?

A. That the pine needles and leaves and small debris had been lodged in the grass and the grass was laying down—facing down hill.

Q. Now, you saw the water running yourself from the spout? A. I did. [615]

Q. You saw the point where the water hit the ground? A. I did.

Q. Now, was there any indentation or impression made on the surface of the ground at all where the water had run? A. There was not.

Q. Was there any abrasion or any cut whatsoever where the water had run down the hill from that point? A. There was not.

Q. Was there any cut of that neighborhood at all? A. There was not—not from water.

Q. Not from the water? A. No.

Q. I mean in that neighborhood of the spout where the water was running down hill?

A. No.

Q. Nothing but the gulches that were there?

A. That is all.

Q. Did you follow the trail down? A. We did.

Q. What was the condition of the trail?

A. It was pretty slippery—a lot of ice in it.

Q. A good deal of ice in it,—what evidence of

(Testimony of Victor C. Clauson.)

wash did you find in the trail?

A. At that one point it showed that water had jumped over the trail somewhere.

Q. I mean in the bottom of the trail,—how did the bottom of the trail look?

A. I wouldn't swear from looking at the trail that any more than the ordinary water had run through it unless I knew it. I couldn't tell from the evidences because small little pebbles were still laying in the trail where the ice had melted off, but a good part of the trail was still covered with ice.

Q. You knew of course that water had run down?
[616] A. Yes.

Q. And knowing what you did, there was evidence that water had run down there? A. Yes.

Q. But aside from that there was no appreciable evidence in the trail of running water?

A. There was not.

Q. Now, at the point where the water slopped over the trail at the apex of the slide, what evidence did you find there of running water?

A. The evidences which I was speaking about, that there were leaves and pine needles and small debris in the grass, and the grass was laying down.

Q. Was there any cut there? A. No, sir.

Q. None whatever? A. No, sir.

Q. Now, Mr. Clauson, where do you live in Juneau?

A. I live up on Harris Street—417 Harris.

Q. In going to and from your work you pass up

(Testimony of Victor C. Clauson.)

and down Gastineau Avenue?

A. I do nine times out of ten.

Q. You don't always take that route, but generally? A. Yes.

Q. And you have done that for how many years, approximately? A. At least five years.

Q. In passing back and forth there did you pass the slide area? A. I did.

Q. Did you pass there the day of the slide and days following? A. I did.

Q. What, if anything, did you notice in the slide area in the way of springs or bedrock flows of water? A. There has always been springs there.

Q. How soon after the slide did you notice those? [617]

A. Whatever time—I couldn't swear what time the slide occurred, but it was, I would say, less than an hour after the slide.

Q. At that time you noticed this bedrock flow of water? A. Yes, sir.

Q. How big a flow was that, Mr. Clauson?

A. I wouldn't say—I wasn't particular about estimating it.

Q. Just give the jury some idea,—I don't mean in inches,—was it a big or small flow?

A. Oh, there was,—it would be called a small creek when it came together.

Q. It formed a small creek when it came together? A. Yes.

Q. How many places were there where it came from the bedrock? A. A number of places.

(Testimony of Victor C. Clauson.)

Q. There were a number of places at that time?

A. Yes.

Q. Have you observed that flow since that time?

A. I have.

Q. How often? A. Many times.

Q. For how long a period?

A. Ever since that time I have been watching it.

Q. Has that water been running continuously from the time of the slide to the present time?

A. As far as I know—every time I have looked at it there has been water.

Q. And you have passed there daily?

A. Yes, sir.

Q. Every day? A. Yes, sir.

Q. During the time this other trial was on here did you have occasion to look at it? A. I did.

Q. Was there any water running then? [618]

A. Two streams then.

Q. Two streams running then. You know the point, Mr. Clauson, where the snowsheds picked up the surface water of Portal Gulch and carried it over the snowsheds and dropped it on to the flume and then on to the ground? A. I do.

Q. Have you observed water coming over there?

A. I have.

Q. Under what circumstances does the water flow over there—I mean in large volumes?

A. Well, after—anything that will produce running water, whether it is melting snow or rain, will cause a good volume of water to run over there,—melting snow or rain, either one of them.

(Testimony of Victor C. Clauson.)

Q. That reminds me—on this 2d day of January what was the condition on the hillside with reference to melting snow?

A. There was a good deal of it,—there was water running in all the gulches on the 2d of January.

Q. Was there snow up above the track level?

A. Certainly.

Q. What was that snow doing—was it melting or lying there? A. Melting.

Q. Melting and running at the same time?

A. Yes.

Q. What was the temperature?

A. It wasn't freezing.

Q. It wasn't freezing? A. No.

Q. On that day what was the volume of water running over that shed, large or small?

A. It was equivalent to a heavy rain—equivalent to what it is during heavy rains.

Q. A very heavy rain? A. Yes. [619]

Q. Now, had you seen that water run there on different occasions prior to that time?

A. Many times.

Q. Do you know how that water looks to one not familiar with the conditions up there? Answer the question yes or no—do you know how it looks?

A. I know how it looks to one person.

Q. To one person not familiar with the conditions up there? A. Yes, sir.

Q. How did it look to him?

A. He told me he thought our flume was broken a number of times. Every time that he saw me

(Testimony of Victor C. Clauson.)

after a heavy rain he would stop me and insist that the flume must be leaking. I asked to take him up and show him and convince him that it wasn't the flume, and he is convinced now that it wasn't the flume.

Q. He isn't convinced yet?

A. I think he is now.

Q. But anyway it took a long time to convince him? A. You bet it did.

Q. That flume is not there now? A. No.

Q. Not at that point—the sheds are still there, or don't you know about that?

A. No, I don't know about that.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. You don't know whether the shed is still there or not, Mr. Clauson?

A. Oh, indeed I do—I went through there this morning.

Q. That was Nels Sorby, was it?

A. Which one?

Q. The man who did the complaining? [620]

A. That is the fellow that complained to me.

Q. He thought your flume was leaking?

A. Yes, sir.

Q. And he mixed the flume up with the snow-sheds?

A. That is what he thought at that time, and had for a long time been thinking.

(Testimony of Victor C. Clauson.)

Q. That is, he thought that the water was coming out of the flume when as a matter of fact it was coming over the snowsheds? A. Yes, sir.

Q. And he thought he would give you warning?

A. Yes, sir.

Q. I understand you to say at 11:15 everything went out? A. Exactly.

Q. Everything was dead?

A. Except the lights.

Q. Except the lights, and they went out about 10 or 15 minutes later?

A. Five or ten minutes later.

Q. When you say everything was dead that means from one end of the mill to the other?

A. Every motor.

Q. Every motor from what?

A. From the course crushing, that is my first department—

Q. So the crushers were out, and down to the lowest—what is the last operation?

A. The retreatment floor.

Q. To the retreatment plant? A. Yes, sir.

Q. And then after the lights went out five or ten minutes later you got a message from Mr. Richards?

A. Oh, it was some time later than that.

Q. I thought you said about 15 minutes after that, or something like that? [621]

A. Fifteen or twenty minutes—the lights had come on again when Mr. Richards phoned me.

Q. The other power was still off?

(Testimony of Victor C. Clauson.)

A. Our motors were still off—we didn't get juice in the mill then for quite a little while after that.

Q. All right. He gave you directions to proceed to the penstock and examine what was wrong there? A. Exactly.

Q. And you got up there and found the motor stopped? A. Yes, sir.

Q. The motor was still warm, wasn't it?

A. I didn't feel it.

Q. And then you gave it a little flop and everything went?

A. I just turned the screen over—that is all I did.

Q. That half a revolution?

A. Just half over—half a revolution.

Q. Didn't need a 3 horse-power motor for you to turn that over? A. No, indeed not.

Q. And then everything went fine again?

A. That is the last I did to the screen.

Q. And then the water stopped running through the spout? A. Exactly.

Q. And followed its regular course?

A. Exactly.

Q. How long did you stay up there?

A. Well, I don't think I was up there longer than 10 minutes—I don't think I was there any longer than that.

Q. And after the expiration of those 10 minutes you went back to your station?

A. No, Mr. Richards and I went down this trail.

Q. Oh, you came down this way?

(Testimony of Victor C. Clauson.)

A. We came down this trail—this Koski trail.

Q. I mean you went down the Koski trail and then you went back to your station—to your business? [622]

A. Went down to the street, and then later I think I went back to the mill.

Q. And you only noticed one point up there where the water had jumped the trail?

A. That is all I noticed.

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 2 o'clock P. M.)

AFTERNOON SESSION.

March 31, 1921, 2 P. M.

Testimony of W. G. Johnson, for Defendant.

W. G. JOHNSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. W. G. Johnson.

Q. Where do you reside? A. 418 7th.

Q. I mean you live in Juneau? A. Yes, sir.

Q. Were you living here at the time of the slide, on January 2d, 1920? A. Yes, sir.

Q. You are engaged in the hardware business?

A. Yes, sir.

(Testimony of W. G. Johnson.)

Q. At that time what position did you occupy with the city? A. I was on the city council.

Q. In connection with that matter, as a city councilman, where, if anywhere, did you go with reference to this slide on the afternoon of the day on which the slide occurred? [623]

A. We went up to what they call the trommel screen.

Q. The city engineer went up with you?

A. Yes; there were three councilmen went up.

Q. Three councilmen and the city engineer?

A. Yes, sir.

Q. Which way did you go up, Mr. Johnson?

A. We took the steps going up alongside of the Dispatch building and hit the trail about half way up the hill.

Q. And then followed the trail up?

A. And then followed the trail up, yes.

Q. In going up that trail did you observe its condition as to whether it was icy or not?

A. There was ice in the trail, yes.

Q. Did you observe its condition with reference to its appearance as to whether it had been washed by water?

A. The trail is pretty much bedrock all the way up and it would be pretty hard to tell whether it had been washed by water or not. Some of the trail looked pretty clean, in some spots it wasn't.

Q. The trail was clean, that is about all you can say about it?

A. That is about all you can say.

(Testimony of W. G. Johnson.)

Q. After you got up to the penstock did you examine the ground to see whether there had been any cut or abrasion or any break in the soil by the action of the water?

A. My recollection is that there had been no break in the soil anywhere near the penstock.

Q. Nowhere around there at all? A. No.

Q. What evidences were there that water had been running there, if any?

A. Well, the natural evidence of seepage water going down the hill, was all.

Q. But there was no break whatever—no trench in the soil whatever? [624]

A. There was no trench dug around the penstock at all that I could see—that I saw at the time.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. Did you see a trench right above the slide area, Mr. Johnson?

A. I went up the trail, all the way up.

Q. Which trail did you take, the one leading alongside of the hill or straight up from the slide? Look at the map here—which trail did you take? See, here are two trails; one of them comes down behind the Moose Hall and the other one is here.

A. I think this is the one here.

Q. Did you see any cut in here?

A. No, I wasn't through there.

Q. I understand you to say that the trail was pretty much on bedrock?

(Testimony of W. G. Johnson.)

A. That is the way it appeared to me.

Q. And of course it couldn't cut into the bed-rock. Did you see a pile of rocks right under the mouth of the chute there, the spout, at the trommel screen?

A. I don't recall them at this time.

Q. Don't recall? A. No.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) The bottom of the trail was rock, you mean?

A. Yes; boulders and rocks in it.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [625]

Testimony of N. B. Cook, for Defendant.

N. B. COOK, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name. A. N. B. Cook.

Q. Where are you employed?

A. At the present time I am with the Juneau Ferry and Navigation Company.

Q. You are purser on the boat?

A. I am purser on the ferry boat, yes.

Q. Were you living here on the 2d day of January, 1920? A. I was, yes, sir.

Q. Where were you employed at that time?

A. Pacific Coast Coal Company.

(Testimony of N. B. Cook.)

Q. Do you remember when this slide occurred?

A. The morning of January 2d.

Q. Where were you at the time the slide happened? A. I was in the office of the company.

Q. Could you point out to the jury on this exhibit where your office was that you were in at that time—have you seen that map before, Mr. Cook? A. Since I came here.

Q. Look and see if you can find your office and point out to the jury where it was.

A. Right here, at the end of the bunkers.

Q. Where you are pointing? A. Yes, sir.

Q. At the place marked "office"?

A. Marked "office."

Q. At the point where it is marked "Pacific Coast coal bunkers"?

A. Yes, and the office is right at the corner.
[626]

Q. That little building at the corner?

A. Yes, sir.

Q. That office is not the same place now, is it?

A. Since that time it has been moved. There is about 40 feet added to the old bunkers and the office moved around.

Q. It doesn't occupy quite that position now. From that office did you have a clear view of the slide? A. Yes, sir, I did.

Q. Prior to the time the slide happened what, if anything, occurred to attract your attention toward the hillside?

A. A series of flashes. I was looking out of the

(Testimony of N. B. Cook.)

window or glass door there,—I happened to be looking out of the door—there is a glass in the door—and there was a series of flashes that first attracted my attention.

Q. How many flashes?

A. There were three distinct flashes.

Q. Did they come in rapid succession, or follow one another not so very rapidly?

A. They were not in rapid succession.

Q. Would you indicate with your hand about how rapidly they followed one another?

A. As I remember it about something like that.

Q. And those three flashes occurred about where, —where did they seem to you to occur on the hillside?

A. A little to the right of those buildings up there, to the right of where the slide occurred.

Q. A little to the right of where the slide occurred?

A. Yes, sir, and up.

Q. From where you were standing?

A. Yes, sir.

Q. What did you do when you saw those flashes?

A. They naturally attracted my attention and I was watching then to see the cause.

Q. Where did you look for the cause of the flashes, Mr. Cook? [627]

A. At that time I thought possibly there was an ore train running along there, a trolley car.

Q. You afterwards learned that the ore train did not run at that point? A. Yes, sir.

(Testimony of N. B. Cook.)

Q. But at that time you thought it ran there?

A. I afterwards learned it was the flume,—I estimated at the time it was the track.

Q. You looked up there to see what there was up there that occasioned those flashes?

A. I thought there was a train running along and the trolley was off and probably hitting along the trolley wire.

Q. And you looked up in that direction to observe?

A. I did, yes, sir.

Q. How long, do you think, you looked up there before you changed your—

A. It must have been, I should judge, three or four minutes.

Q. Where did your eye glance down to—what point on the hillside?

A. When I was watching after these flashes and trying to find the cause of it, below and to the left I noticed a crack starting in the snow,—there was more or less snow on the ground at the time, and I noticed this crack.

Q. Where was that crack with reference to the place where the slide afterwards occurred?

A. It was right at the apex.

Q. Right at the top of it? A. Yes, sir.

Q. How wide did that crack look to you when you first noticed it, and how did it appear?

A. It was almost imperceptible at first—of course I watched it at the time and it gradually widened and of course my attention was glued to it.

Q. You may tell the jury just what you saw—how that crack acted as you looked at it. [628]

(Testimony of N. B. Cook.)

A. I first saw this little black mark, not knowing what it was, and it gradually widened and naturally my attention was glued to it, and it gradually widened until the earth began to move,—it widened very slowly at first, and then when the mass began to start it gained momentum.

Q. Then what did you see—what happened then?

A. The earth began to move, and then it started the buildings, and the buildings started down with the mass.

Q. The whole mass lying above between the buildings and the crack moved? A. Yes, sir.

Q. That is the way it looked from where you stood? A. Yes, sir.

Q. Then the buildings began to move?

A. They began to move, yes, sir.

Q. Then what happened?

A. They started to move and they hit at the bridge there, or street.

Q. Before that had there been any movement of the electric tower?

A. During the movement of the earth and these buildings there was another large flash.

Q. Did you observe what happened to the tower standing in the slide area or slide mass at that time?

A. No, I did not.

Q. You didn't observe that?

A. No, sir; I was watching the buildings.

Q. You saw the flash, however?

A. Yes, I saw the flash.

Q. But the buildings went before you saw the

(Testimony of N. B. Cook.)

flash? A. They had started, yes, sir.

Q. How did the buildings come down the hill?

A. As I say, they moved rather slowly—seemed to hesitate at this bridge or street, then there seemed to be a jump off, then they gained very rapidly in momentum. [629]

Q. At the street how long did the buildings hesitate?

A. Well, I hardly know—I don't know the length of time, only I thought they were going to stop there.

Q. You thought they were going to stop?

A. Yes, sir.

Q. But they finally started again and then crashed down the hill? A. Yes, sir.

Q. After the buildings got down the hill, Mr. Cook, and had settled, did you observe the apex or the point from which the slide started?

A. Yes, sir.

Q. At that time was there any water running over the apex of the slide?

A. There was not any water.

Q. How long after that was it before you saw water running over the apex of the slide?

A. Well, the various things that I did, I should judge at least 15 minutes.

Q. What did you do between the time that you saw the slide and the time that you saw the water coming over?

A. I watched these buildings until they all broke apart and the slide settled, then I ran around to the

(Testimony of N. B. Cook.)

bunkers—there were a number of teams there and I called the attention of the teamsters to the slide, and in the meantime some of them had seen it, so I came back to the office and called up Mrs. Cook,—I had difficulty in getting her—

Mr. RODEN.—We don't want anything about your calling Mrs. Cook.

Q. Just tell what you did.

A. I phoned—I had difficulty in getting central,—

Mr. RODEN.—I don't care what you told Mrs. Cook.

The WITNESS.—I am not telling what I told Mrs. Cook.

Q. Tell what you did that took time.

A. I phoned; then I went in and put on my overcoat and overshoes; in the meantime the phone rang again, and I answered it, and [630] fixed the fire—banked the fire, and when I came out started to run over there, and that is when I first saw the water coming over there.

Q. It may have started before that but that is the first time you saw it?

A. I don't think it started before that because I think I saw it just as it came over.

Q. You think you saw it just as it commenced to come? A. Yes, sir.

Q. That is after you had done these various things that you have testified to?

A. After I had done these things, yes, sir.

Q. Now, Mr. Cook, how large a volume of water was coming over there at that time?

(Testimony of N. B. Cook.)

A. At first there wasn't any water of any quantity, then it came with a gush.

Q. Came with a gush afterwards? A. Yes, sir.

Q. Then there was how much?

A. I don't know as to the quantity—there seemed to be considerable—it was kind of spread out.

Q. Did the water appear clear or otherwise?

A. Whitish.

Q. It was whitish from where you were?

A. Yes, sir.

Q. Was it clearly visible? A. Very much so.

Q. What was the width of the stream, Mr. Cook, that you saw coming over there?

A. It was rather hard to judge the width—it seemed to take in—well, it came directly over the apex, but I don't know how wide it was.

Q. Quite a wide stream?

A. Yes; 6 or 7 or 8 feet wide, something like that.
[631]

Q. Mr. Cook, I direct your attention to a picture, have you seen that picture before?

A. No, I haven't; no, sir.

Q. I wish you would look at it.

Mr. HELLENTHAL.—The small one has not been offered—have you any objection to having this one offered?

Mr. RODEN.—No.

Mr. HELLENTHAL.—I offer this in evidence.

Mr. RODEN.—All right—have it marked as plaintiff's exhibit.

(Whereupon said picture was received in evidence and marked Plaintiff's Exhibit "O.")

(Testimony of N. B. Cook.)

Q. I now hand you these two pictures, the enlargement is supposed to be the same thing as the small one,—you have never seen either one of those before? A. No, sir; I haven't.

Q. Those pictures were supposed to have been taken about ten minutes after the slide. I will ask you to look at them and state whether they fairly represent and illustrate just what you saw on the hillside? A. Yes, they do—just as I saw them.

Q. With reference to snow and everything else?

A. Yes, sir.

Q. Was that picture taken before or after the water came over that you saw,—does the water show that you saw? A. No, it does not.

Q. There isn't any water coming over the apex of the slide in the picture? A. No, sir.

Q. The water that you saw was a white stream—would it be clearly visible on that picture?

A. It surely would, yes, sir.

Mr. HELLENTHAL.—You may cross-examine.
[632]

Cross-examination.

(By Mr. RODEN.)

Q. Do you see any water on that picture at all, Mr. Cook?

A. On the slide,—not that I can discover.

Q. Take a look at it,—it is full of water. Of course this might be taken on a poor day and shows against a dark background.

A. I don't see any indication of a running stream there.

(Testimony of N. B. Cook.)

Q. What do you think this is, and this down here, isn't that water?

A. No, I don't think so; this might be here, but it doesn't look like it to me,—it may to you.

Q. Anyway the water that you saw is not on there? A. No.

Q. You didn't see any water until 15 minutes after the slide? A. No, sir, I didn't.

Q. You saw all those things that you spoke of from the Pacific Coast dock?

A. From the coal office.

Q. What is the distance from the place where you stood up to the penstock, about, in an air line?

A. About 600 or 700 feet, I should judge.

Q. Isn't it nearly 2000 feet?

Mr. HELLENTHAL. — Mr. Cook evidently doesn't understand your question. The question counsel asked was to the penstock.

The WITNESS.—Oh, the penstock—I thought you meant the slide.

Mr. RODEN.—It isn't very much farther over to the penstock than to the slide.

The WITNESS.—I don't know the distance.

Q. (By Mr. RODEN.) You saw a little crack opening up from the Pacific Coast dock?

A. Yes, sir.

Q. At first you couldn't see it at all? [633]

A. I presume you couldn't see it when it first started, but I certainly saw it.

Q. How long have you lived here, Mr. Cook?

A. In Juneau?

Q. Yes.

(Testimony of N. B. Cook.)

A. I have been here four or five years—that is, in and out of Juneau.

Q. You have seen that sidehill a good many times, haven't you? A. Certainly.

Q. Whereabouts was it with reference to the slide—the elevation of the sidehill—that you saw these first flashes you spoke about?

A. The other way, at the right, and seemed to be a little higher than—

Q. It was down the channel, then?

A. Yes, down the channel.

Q. And then you began to look for a trolley line?

A. Yes, sir.

Q. Thought maybe it might be ore cars running along there? A. Yes, sir.

Q. You have been in this town four or five years and don't know where the ore cars run along the sidehill, of the Alaska Juneau Company?

A. No, I didn't

Q. You are in the employ of the ferry company, are you not? A. Yes, sir.

Q. That is controlled by the Alaska Treadwell, isn't it? A. I don't know their business at all.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) The Alaska Treadwell has no stock in the Alaska Ferry and Navigation Company, has it, and never had any, had it?

A. I don't know anything about it, gentlemen;

(Testimony of B. D. Stewart.)

all I do is to draw my pay—I am more interested in that than anything.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [634]

Testimony of B. D. Stewart, for Defendant.

B. D. STEWART, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. B. D. Stewart.

Q. Where do you reside, Mr. Stewart?

A. In Juneau.

Q. What is your profession? A. Engineering.

Q. You have also studied geology, Mr. Stewart?

A. I have, yes.

Q. What school are you from?

A. University of Montana.

Q. How long have you followed your profession?

A. Twenty years.

Q. During that period you have had a varied experience? A. I have.

Q. You have been connected with the Government Geological Survey? A. Yes, sir.

Q. For some years? A. 7 or 8 years.

Q. And since then you have done all sorts of engineering work in Idaho, Montana and Alaska; isn't that true? A. That is true, yes.

Q. Now, Mr. Stewart, were you in Juneau on the

(Testimony of B. D. Stewart.)

day of the slide that is now the subject of inquiry, January 2, 1920? A. I was, yes.

Q. After the slide happened did you have occasion to go by the slide to the penstock of the Alaska Juneau Company?

A. I went up there in the afternoon of the day that the slide occurred. [635]

Q. Which way did you go, Mr. Stewart?

A. I went up a trail that leads from the vicinity of the Bergmann Hotel—I think they call it the Harris Street trail.

Q. Then you went up that way to the penstock?

A. Yes.

Q. After getting to the penstock did you make an examination of the conditions surrounding the penstock with reference to whether the ground showed any evidences of running water? A. I did, yes.

Q. What evidences did you find, Mr. Stewart?

A. I found evidences of a recent flow of water from the penstock.

Q. What evidences did you find Mr. Stewart?

A. Why, the principal evidences were in the grass and bushes, all bent over by a flow of water—apparently recent flow of water, and leaves, grass, etc., caught on the twigs.

Q. Did you find any evidence of abrasion or cut in the soil?

A. I didn't notice any, no.

Q. If there had been any such thing there you would have noticed it? A. I think so.

Q. You were there for that purpose—looking it over? A. Yes.

(Testimony of B. D. Stewart.)

Q. How far down the hill did you follow the course of the water as you could trace it by the leaves, sticks, moss and things of that kind and the bent over condition of the grass?

A. That afternoon I merely examined it right in the vicinity of the penstock. It was nearly dark when I got up there, and I came on down.

Q. Were you up there again, Mr. Stewart?

A. I went up again the next morning.

Q. Did you again look the ground over?

A. I did.

Q. Did you find any evidences of running water that you had not seen the day before, at the penstock? [636]

A. Not at the penstock.

Q. Where did you go from there at that time?

A. I followed down the course of the water as near as I could.

Q. What evidences of running water did you find as you went down the hill?

A. Similar to the ones that I have described.

Q. Was there any evidence of cut or abrasion or wear in the soil?

A. Not in the soil itself, no; it was merely in the vegetation—mostly on the surface.

Q. There was no evidence of any scouring of the soil? A. I did not observe any.

Q. Then did you follow the water down to where it got into the trail? A. I did.

Q. Did you follow the trail down? A. I did.

Q. What was the condition of the trail as to

(Testimony of B. D. Stewart.)

whether it was icy or otherwise?

A. It was icy in spots.

Q. It was icy in spots on the day after the slide?

A. Yes.

Q. What was its condition with reference to wash,—had it been cut down by the action of the water running through it, or what was its condition?

A. No, the action of the water in the trail was almost imperceptible to me. I followed it to the point where it went into the trail, then I followed the trail down, and there were no evidences of it having left the trail until it got just above the apex of the slide, then there were evidences of the water having left the trail.

Q. What evidences did you find there of water having left the trail?

A. The evidences there were similar to what they were up further on the hill. [637]

Q. What were those evidences?

A. The bending over of the vegetation on the surface.

Q. Was there any evidence of a cut there?

A. No.

Q. At that time the apex was to one side of the trail?

A. It was to one side of the trail, yes, several feet.

Q. How many feet?

A. I didn't make a particular note of it—it must have been 10 or 15 feet.

(Testimony of B. D. Stewart.)

Q. Some little distance? A. Yes.

Q. Did you follow the trail down to the administration building?

A. I followed down between the trail and the slide area.

Q. What evidences of wash were there in the trail farther down as compared to what you found above the slide area?

A. I didn't notice as to that.

Q. How is that?

A. I didn't make any observation as to that.

Q. Now, Mr. Stewart, you are familiar with the slope of Mount Roberts? A. I am.

Q. And with the character of the soil? A. Yes.

Q. And know how it has been formed and deposited? A. Yes.

Q. And know how those soil deposits are situated on the slope? A. Yes.

Q. Now, what would be the effect upon those soil deposits upon the hill, the deposits lying below, if a quantity of water, say 1, 2 or 3 or more sluice heads, were turned loose or liberated at the level of the flume, at the point where the penstock was formerly situated, and permitted to run down the hill,—what would that water do?

A. You mean under the conditions as they exist on the hillside? [638]

Q. Yes, sir.

A. Well, it would do just what this water did—flow over the surface.

Q. Flow over the surface, and if it ran long

(Testimony of B. D. Stewart.)

enough what would it do?

A. If it ran long enough to scour through the mass of roots and vegetation that covers the soil I think it would cut a trench down through the surface.

Q. A small quantity of water running for a short time might not cut a trench? A. That is true.

Q. But a considerable quantity of water would soon cut a trench, would it not, Mr. Stewart?

A. Probably would.

Q. That is, under the conditions that existed at that time?

A. Yes; if it flowed for some length of time. I think it would take some little time for it to do that because the soil is covered by a pretty heavy mass of leaves, roots, moss and small bushes.

Q. That protects it against the action of the water? A. Yes.

Q. On that hillside as you went down there, were there any cracks that the water could run into between the apex of the slide and the penstock?

A. I didn't see any.

Q. The ground was solid?

A. As far as I noticed.

Q. So that the water followed the trail and stuck to the trail? A. Up to the time it left it, yes.

Q. Up to the time it left it where the sharp bend occurred? A. Yes.

Q. Now, Mr. Stewart, what would be the effect if one were to make an excavation or a cut in the soil deposits on that hillside anywhere, say a hun-

(Testimony of B. D. Stewart.)

dred feet up from where that [639] Koski house used to stand—in that vicinity—what effect would that have upon the mass lying above it?

A. It would weaken the mass above it—disturb its repose.

Q. What would that ultimately result in?

A. Probably result in a rupture somewhere along the hillside in the soil—perhaps a slide eventually,—it would probably result in a slide.

Q. Now, Mr. Stewart, I call your attention to what purports to be a cross-section of this side area (Defendant's Exhibit No. 6)—I don't suppose you have seen this map before, have you, Mr. Stewart?

A. I think I have, yes.

Q. Then you are familiar with what it shows?

A. Yes.

Q. Assuming there was a cut in the ground at the place to which I am now pointing, right behind the building, which is a side view of what is supposed to be the Koski house, what does it indicate as to what was the cause of the slide on that occasion?

A. I think the making of a cut at that point would certainly weaken the mass above it and tend to cause it to slide, for the reason that loose soil of that sort, deposited on a hillside of that sort, will rest at a certain angle of repose—a certain angle from the horizontal, which it naturally assumes; and the whole mass under those conditions has no equilibrium or no balance, you might call it, and if a cut of that kind is made on a slope of that

(Testimony of B. D. Stewart.)

sort the balance or the equilibrium is disturbed, of the whole mass.

Q. Then what happens?

A. Strains set up within the mass itself and tend to cause it to slide.

Q. When a slide happens under those conditions what form does the slide mass take?

A. Well, that depends on the nature of the mass.
[640]

Q. Well, assuming the mass to be of a nature such as it is over here, with reference to the curved condition—directing your attention to this curved condition at the head of the slide—what does that indicate?

A. It tends to assume a definite curved form.

Q. It tends to assume that kind of a form?

A. Not only the curved form, but the curve itself is of a peculiar type.

Q. What is that type known as among geologists and mathematicians?

A. Known as the elastic curve.

Q. The principle of that curve, or the geometry of that curve has been known, I believe, Mr. Stewart, for a long time, in a general way?

A. The nature of the forces that would appear under those conditions has been known for a considerable length of time. The fact that a break would occur along a curve such as is known as the elastic curve is a matter of recent knowledge.

Q. When and by whom was that knowledge first brought out?

(Testimony of B. D. Stewart.)

A. It was brought out by Dr. Becker of the Geological Survey in connection with studies that he made at the Panama Canal.

Q. You know Dr. Becker, don't you?

A. I have met the doctor.

Q. He is connected with the Government Geological Survey? A. Yes.

Q. Now what, if anything, did Mr. Becker do in the way of presenting to the world a formula to determine the locus upon the ground of the elastic curve where a cut was made?

A. Well, the Doctor assumed a condition which really did not exist at the Canal, but it was so nearly like the conditions that existed that the principles involved were the same as those involved in the slides that were being studied. In other words, he assumed a mass that was perfectly homogenous, that is, that the particles that went to make it up were all of the same size and of the same character, and he assumed [641] a cut was made in that, and then he proceeded to outline what would be the result or effect upon the mass as a whole as a result of that cut, and in connection with that he worked out this formula by which he constructed the elastic curve.

Q. By the application of that formula what did he determine with reference to where the slide would occur when it did happen?

A. He could determine it very accurately.

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN THREE VOLUMES.)

ALASKA JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

VOLUME III.

(Pages 769 to 1083, Inclusive.)

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

FILED

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F. D. MONCKTON,
CLERK,

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(Testimony of B. D. Stewart.)

Q. Determine very accurately where the slide would happen?

A. That is assuming certain conditions—

Q. Yes, that is assuming certain conditions to exist?

A. He had to assume certain conditions which in the case of a concrete example would probably be unknown, but he made his theoretical curve and then by subsequent observation he verified on the ground the fact that in the mass there at the Canal rupture did occur along such curve.

Q. He verified on the ground by actual observation that his theoretical calculation was correct?

A. Yes, sir.

Q. If you had before you, Mr. Stewart, the exact data of the character of the soil lying upon the hillside, such as Mount Roberts, or any other place, and had before you the height of the cut made in the soil, its slope and its elevation, and had before you also the slope of the hill, the character of the bedrock and its slope, and the exact conditions in the soil mass with reference to roots, and all those matters, so that your knowledge would be exact upon those subjects, then could you sit down and by the application of Dr. Becker's formula determine exactly where the slide would happen?

A. If you knew all of the necessary elements, yes.

Q. With the same accuracy that an eclipse or any other matter of that kind can be foretold?

A. You could, yes.

Q. It would only be a matter of knowing the ex-

(Testimony of B. D. Stewart.)

act data with reference to the character of the soil lying above the cut? [642]

A. It would, yes—exact and complete.

Q. Exact and complete, yes. Of course in practical work your observations would not be as exact as those of the astronomer because of the fact that you cannot tell where there might be a root in the ground, or where there might be a big rock in the ground, that might retard the action of the mass, is that true? A. That is true.

Q. In other words, if you had all the elements of what the frictional resistance would be you could determine it exactly. A. You could.

Q. Now, this drawing, does that show the elastic curve as exemplified by Dr. Becker?

A. It is an approach to it. It is the same type of a curve—I would say local conditions would cause variations which probably appear there, but in a general way it resembles the type of the curve.

Q. Mr. Stewart, where a cut is made in the ground and the support taken away from the mass lying above it, what happens—what is the first thing that happens?

A. Strains are set up in the mass lying above the cut.

Q. I wish you would describe that to the jury so that they will understand just what you mean by that statement.

A. As I explained before, in its natural condition, as it lies upon the hillside, that mass of soil is in the state of rest—that is there are no forces

(Testimony of B. D. Stewart.)

acting upon it which would tend to cause it to move.

Q. And that would be so independent of the moisture contained in the soil—that is, provided it does not get so moist that it runs off like water?

A. Not unless it gets to the state where it would flow.

Q. But until it would flow,—while it is in a solid mass, it lies at rest? [643]

A. Yes; I should say that the angle from the horizontal at which it lies would represent a state of rest under the most unfavorable natural conditions for it to lie that way.

Q. The slide was deposited in rainy weather, in other words?

A. It has been subjected to rainy weather, of course, for an unknown number of years.

Q. And on account of that it has been made as heavy as it could be made? A. I think so.

Q. Proceed, now, Mr. Stewart, excuse me for interrupting you.

A. The making of a cut at a point on that hill-side would rob the mass lying above it of a part of its natural support which held it at rest and the removal of that support would set up strains within the mass.

Q. What strains are those—where do they originate from?

A. From the weight of the mass itself.

Q. From the weight of the mass itself and the laws of gravitation?

A. And the laws of gravitation, of course.

(Testimony of B. D. Stewart.)

Q. How would those laws affect the mass from then on—from the time the cut was made?

A. Tend to cause it to move.

Q. The pull on the mass from then on is constant? A. It is.

Q. There is a steady, constant pull down hill?

A. A tendency for it to move down hill and refill the excavation that was made.

Q. How does that continue to act?

A. The strains, if allowed to operate for a sufficient length of time, will finally result in a rupture.

Q. What do you mean by a rupture?

A. Well, a breaking loose along a certain definite surface.

Q. Along a definite surface, and that surface is where with reference to where the elastic curve was?

A. If it was a perfectly homogenous mass it would be along the [644] line of the elastic curve.

Q. Then what happens,—does the mass move slowly or suddenly—how does it move after that?

A. The mass would probably move imperceptibly at first—small breaks would occur, but as soon as complete rupture along the surface upon which it is going to slide takes place it would probably be rapid from then on.

Q. At first it would be very slow, so that you couldn't see it? A. It would, yes.

Q. What evidences would appear at the toe of the slide mass after the motion had become percep-

(Testimony of B. D. Stewart.)

tible and after the mass had really begun to move in a perceptible way?

A. According to Dr. Becker observations at the Canal showed the first effect was a bulging at the toe—what might be called the foot of the elastic curve.

Q. How would that become evident at the toe?

A. By a bulging of the soil at the toe.

Q. Loosening up of some muck and rocks?

A. I should think so.

Q. Would that bulging be apparent to the naked eye except from the fact that muck and rocks were bulging out there?

A. Probably not,—not at first.

Q. At the same time that this bulging and rupture would occur below, what would happen above?

A. I should think cracks would appear at the surface.

Q. This bulging at the toe might have been occurring for a considerable length of time before it became evident? A. Yes.

Q. Then, after the crack was first formed, how would the mass act?

A. As soon as rupture took place it would probably begin to slide.

Q. What, if anything, in the way of water would become evident at the toe of the slide mass after the rupture had occurred?

A. As a result of the content of water in the mass above it?

Q. Yes. [645]

(Testimony of B. D. Stewart.)

A. I should think water might appear at the foot of the surface upon which the sliding was occurring.

Q. The water would squeeze out of the mass?

A. I would think so, yes.

Q. And the volume of water that would come out at one time would depend upon the squeeze at that particular time—the extent of the squeeze?

A. More or less, yes.

Mr. HELLENTHAL.—I think you may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Now, the water would squeeze out, Mr. Stewart, but the dirt, the bulge, that would not fall down, would it—that would not cave in?

A. You mean after movement had started?

Q. Yes.

A. Yes, the dirt would naturally fall over the toe.

Q. Sure—that would be the first place where the dirt would begin to cave, wouldn't it?

A. I should think so, yes.

Q. Sure—and a man doesn't have to be a scientifically trained man to know that, does he?

A. No, I wouldn't think so.

Q. You can see that anywhere on the sidehill where you make a cut or anything else?

A. That is the first place it falls off.

Q. I understand you to say, Mr. Stewart, that Dr. Becker's theory—and it is only a theory, after all, isn't it? . A. Yes, it is a theory.

(Testimony of B. D. Stewart.)

Q. Sure—is based upon the proposition that the whole mass is what you have called homogenous. That means, if I am correctly informed, that all parts of the mass are of the same character? [646]

A. Yes; I think he makes a likeness there to a mass of jelly—the particles are the same.

Q. Or a sand hill,—suppose you had a bank where there was nothing in it but sand?

A. If the grains were of the same size and the same character that would be the same; yes.

Q. But where you have a great big boulder three or four feet through and very fine particles the size of said, there Dr. Becker would have considerable difficulty in figuring out the elastic curve, wouldn't he? A. He probably would have; yes.

Q. And so would anybody else?

A. Yes, it would be hard for anybody else to do.

Q. Your attention has been particularly called to the elastic curve since Mr. Hargraves gave you a book two or three weeks ago on it, hasn't it?

A. Yes, more particularly since then.

Q. You never read anything about it by Dr. Becker before that? A. No.

Q. And Mr. Hargraves let you have that little book,—do you know where he got that a few weeks before these cases were tried? A. No.

Q. Have you still got that book? A. No.

Q. You came pretty early upon the scene down there, Mr. Stewart, I understand you to say?

A. I was down there about 10 or 15 minutes afterwards, I think—I went down immediately after I heard the fire bell ring.

(Testimony of B. D. Stewart.)

Q. And you saw the mud and corruption in Izzy Goldstein's store, did you? A. I did; yes.

Q. What was that matter composed of? [647]

A. As you say it was mud largely.

Q. Was there any water in it?

A. There was a good deal of water content in it; yes.

Q. And that had come down the hill, hadn't it?

A. Probably had.

Q. Sure, and showed very strong evidences of water?

A. There was water mixed with it; yes.

Q. More in fact than could be squeezed out of this mass?

A. I wouldn't say that there was; no.

Q. You wouldn't be positive about that?

A. No.

Q. Now, then, suppose the stuff were as it was just prior to the slide and a considerable volume of water is poured on that mass, would that have any effect upon making that ground move?

A. It might if it could penetrate it immediately and become a part of it.

Q. The mere weight of that water below would have this effect, wouldn't it?

A. No; there would be very little weight on a slope of that angle.

Q. Now, you have been talking mathematically, and we will talk mathematically about the weight too. If the weight were ever so small it would still have its effect upon it, wouldn't it?

(Testimony of B. D. Stewart.)

A. Gravity would operate upon whatever water was on the surface.

Q. And the water would expedite the slide, wouldn't it?

A. That would be a very negligible weight, however—a small stream of water flowing over the surface, as compared with the weight of the mass itself.

Q. Let us suppose that the stream were of pretty large proportions and that the water had saturated the mass to the point, practically, of complete saturation and the mass was almost ready to move, it wouldn't take very much more to break the camel's back, would it?

A. Probably, if the mass had already started to move that would not have any effect on it at all—it would have slid anyway. [648]

Q. Yes, if the mass were ready to slide it would have slid anyway?

A. On account of the strains being set up.

Q. But if the mass had not already moved it might have been one of the causes of the movement?

A. No, I don't think so.

Q. You don't think so? A. No.

Q. Then it would not be the last straw on the camel's back?

A. I think it would be a very remote possibility.

Q. Now, in your opinion the water had nothing at all to do with this slide; is that the idea?

A. I don't think that surface water did, no.

(Testimony of B. D. Stewart.)

Q. And it was nothing but that cut that Koski had made that caused the slide?

A. That cut with the other conditions that existed there at the time.

Q. You have seen a good many other cuts around this town, haven't you? A. I have.

Q. You have been here a good many years. Isn't it a fact that practically all of the houses on that sidehill have cuts, more or less?

A. That is true.

Q. And no great attention has been paid to the presence of the elastic curve, has it?

A. No great attention, no; because in most cases, according to my observations, there have been means taken to bulkhead the point at which the cut is made.

Q. But there are a good many places in which there have been no such means taken?

A. Yes; and where those places occur I think you will find there is more or less sliding taking place.

Q. You mean there is a little crumbling off at the face? [649] A. No, there is sliding.

Q. Take a look at the big cut that is back of the General Hospital down there—you are acquainted with that cut, aren't you?

A. No, I have never seen it.

Q. Take a look at it—it is down there.

Q. I can see a cut back there, yes.

Q. It is quite a high bank and quite a deep cut?

A. Seems to be.

Q. Is there sliding there?

(Testimony of B. D. Stewart.)

A. There isn't a slide there now.

Q. There is crumbling going on on the face?

A. There may be surface erosions, but a surface erosion is different from the bulging I spoke of at the toe of the slope.

Q. The same state of facts exists at the administration building down there, doesn't it?

A. Probably does.

Q. The same state of facts exists with a number of other buildings? A. Probably does, yes.

Q. How long were you in the employ of the Alaska Juneau Company?

A. I have done considerable work for them—I never was actually in their employ.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Have you ever observed a particular place in Juneau, Mr. Stewart, where a cut was made in order to see just what happened?

A. You mean in order to determine whether a slide would take place or not?

Q. Have you ever observed the effect of a cut in connection with your own observations here?

A. Yes, I have.

Q. Can you tell the jury about a specific instance, and state [650] just how it acted?

A. There is a case just back of my house almost where it is still in operation.

Q. Explain the whole situation to the jury.

A. The case I have in mind is right back of

(Testimony of B. D. Stewart.)

Claude Erickson's house alongside of my house. There was an excavation made there in order to make room for his house. The cut was made there a number of years ago, and a concrete wall was put up in front of it to protect the house—in fact the back of the house is a concrete wall—and this sliding action has been taking place there ever since, and the pressure has become so great there—the tendency for the whole mass to slide has become so great—that that wall, which is at least a foot thick, is pushed right in so it is a concave curve now instead of a vertical wall, on account of the pressure of that whole bank.

Q. It assumed a rounded slope in front?

A. I think the same slope remained there for years until the cut was made.

Q. The concrete wall has assumed a bulging form? A. Bulging right out to his house, yes.

Q. Just as the mass—

A. It is due to those forces that I mentioned in my testimony.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) And if that same principle had worked in this case, then Koski's house would have been shoved out here the same as Erickson's wall has been shoved out?

A. It would eventually, yes.

Mr. RODEN.—That is all.

(Witness excused.) [651]

Testimony of John Trelons, for Defendant.

JOHN TRELONS, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. John Trelons.

Q. Where do you live, John?

A. At the Alaska Juneau boarding-house.

Q. Were you living there on the 2d day of January, 1920? A. Yes, sir.

Q. The day that the slide occurred? A. Yes.

Q. On that day did you come to town?

A. Yes, sir.

Q. At about what time did you leave the boarding-house?

A. I left the boarding-house after half-past ten,—between half-past ten and eleven.

Q. You do not know the exact time? A. No.

Q. Did you pass through No. 3 tunnel on your way to town? A. Yes, sir.

Q. When you got to where the lights were in the tunnel were the lights burning?

A. The lights were burning.

Q. Now, then, did you pass the trommel screen afterwards? A. Yes, sir.

Q. When you got to the trommel screen house was there any water coming from the spout?

A. Not that I know of.

(Testimony of John Trelons.)

Q. No water? A. No.

Q. You passed right by it? [652]

A. Yes, sir.

Q. Within about how many feet of it?

A. Right on the side of it—about 5 or 6 feet.

Q. About 5 or 6 feet away from the spout?

A. Yes, sir.

Q. Was the trommel screen running?

A. Yes, sir.

Q. How could you tell it was running?

A. I heard the noise of it.

Q. Then you went downtown?

A. I went downtown on the trail.

Q. And you afterwards heard the slide had happened? A. Yes; that I saw from the street.

Q. You were not at the slide when it happened?

A. I didn't know it before I saw it.

Q. About what time was it when you passed the trommel-screen house?

A. It must be around 5 to 10 minutes to eleven.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. How long have you been in the employ of the company? A. What?

Q. How long have you worked for the company?

A. About 4 years.

Mr. RODEN.—That is all.

(Witness excused.) [653]

Testimony of Jake Crophy, for Defendant.

JAKE CROPLEY, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Jake Crophy.

Q. You are a son of Ike Crophy who formerly lived here? A. Yes, sir.

Q. You are working for the Alaska Juneau Company, aren't you? A. Yes, sir.

Q. Were you working for the Alaska Juneau Company on the 2d of January, 1920?

A. Yes, sir.

Q. And on the 31st of December?

A. Yes, sir.

Q. On the 31st of December, 2 days before the slide, when did you go to work in the morning?

A. I went to work maybe,—well, I left home about 6:30.

Q. What route did you take in going to work with reference to where this trommel screen was,—you know where that was, don't you?

A. Yes, sir; I took the Bergmann route and went right up by the screen.

Q. How far were you from the spout of the screen as you passed by there?

A. I should judge about 5 or 6 feet.

(Testimony of Jake Cropley.)

Q. What time was it in the morning when you passed that screen on the 31st?

A. Oh, it was about a quarter to seven—10 minutes to seven.

Q. A few minutes before 7 o'clock?

A. Yes, sir.

Q. You took the train up to the mine? [654]

A. Yes, sir.

Q. At that time was there any water coming from the spout of the screen? A. No, sir.

Q. Now, on that day when did you come back from work? A. About a quarter-past four.

Q. In the afternoon? A. Yes, sir.

Q. Did you again pass the screen at that time?

A. Yes.

Q. Was there any water coming from the spout of the screen at that time? A. No.

Q. The next morning did you go to work?

A. No, I didn't.

Q. You didn't go to work on the morning of the first?

A. No; I went to work on the afternoon shift on the first.

Q. Oh, in the afternoon; you went to work on the afternoon shift, on the first? A. Yes, sir.

Q. What time did you pass the screen then?

A. 2 o'clock.

Q. At 2 o'clock the afternoon of the first you passed this trommel-screen house where the spout was? A. Yes, sir.

Q. At that time was there any water coming from the spout? A. No.

(Testimony of Jake Cropley.)

Q. When did you come back off shift?

A. We come back about a quarter to twelve.

Q. At that time,—that was a quarter to twelve at night? A. Yes.

Q. At that time did you pass the screen again?

A. Yes. [655]

Q. Was there any water coming from the screen then? A. No.

Q. Now, the next day you didn't go up until afternoon? A. Yes, sir.

Q. On your way up to the mine did you stop at the place where the penstock was? A. We did.

Q. Did you go around there any?

A. I went down to the penstock.

Q. You went down to the penstock? A. Yes.

Q. Did you go around the penstock where the spout came out?

A. I went right down underneath where the penstock spout was.

Q. At that time was there any trench or cut in the ground made by the running water?

A. There was not.

Q. If there had been you would have seen it?

A. I would have.

Q. What, if anything, occurred very shortly before the slide—before that time, in the way of a snowslide up the hill that you noticed?

A. There was a little snowslide come down there in a little trench right by the penstock, and it washed a lot of loose dirt down underneath the penstock. There was a couple of little slides that

(Testimony of Jake Cropley.)

winter—that one went across there just before we got to the dry-room and washed a lot of loose earth down the hill.

Q. That was laying in by the penstock?

A. Yes.

Q. Do you know where the water falls off the snowsheds and spouts off the flume at the old portal of No. 3 tunnel? A. I do.

Q. When did you first observe that?

A. The first time I ever noticed it was the time they had the [656] flood down in the Casey Shattuck addition.

Q. Where were you?

A. I was down at the city dock.

Q. That was the first time you ever noticed the water coming over that place? A. Yes.

Q. Where did you think the water was coming from when you saw it at that time?

A. I thought the flume or something was busted there, the way it looked to me.

Q. That was the way it looked to you?

A. Yes, that was the way it looked to me.

Q. That water was coming out of the flume?

A. Yes, before I knew what it was.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Has the Alaska Juneau got anything up there to shut off this water that comes over the snowsheds? A. What is that?

(Testimony of Jake Cropley.)

Q. Has the Alaska Juneau any arrangements up there to shut off the water that comes over the snowsheds?

A. I don't think they have—I don't know anything about it.

Q. How long have you worked up there, Jake?

A. I think this is my third winter I have worked for them up there.

Q. Your father worked for them how long?

A. My father worked for the Treadwell Company over on the Treadwell ditch for 27 years.

Mr. RODEN.—That is all.

(Witness excused.) [657]

Testimony of R. E. Beistline, for Defendant.

R. E. BEISTLINE, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. R. E. Beistline.

Q. Where do you live, Mr. Beistline?

A. Juneau.

Q. Are you working for the Alaska Juneau Company? A. Yes.

Q. Were you working for them on January 2, 1920, the day of the slide? A. Yes, sir.

Q. Where were you in the forenoon of that day?

A. I was at the beach on that day.

(Testimony of R. E. Beistline.)

Q. What, if anything, did you observe in the way of an electric flash on the hillside in the direction of where the slide afterward occurred?

A. I was in No. 2 warehouse, and I noticed the flash. I was looking toward the bay and I seen a flash come over the building—the reflection of a flash.

Q. About what time of day was that?

A. Between 9:30 and 10 o'clock.

Q. Now, Mr. Beistline, were you ever employed as flume tender by the Alaska Juneau Company?

A. I was.

Q. For how long a period? A. For seven years.

Q. Do you know where the water runs over the sheds down over the flume near the old portal of No. 3 tunnel? A. Yes, sir.

Q. At the time of the Casey Shattuck flood, in the afternoon, [658] where were you?

A. I was on the other side of No. 1 tunnel, in the Last Chance Basin.

Q. That *would up* toward the mine?

A. Yes, sir.

Q. What, if any, instructions did you get at that time from your downtown office?

A. I received word from the superintendent to shut off the water—the water was running over No. 3 tunnel.

Q. What did you do?

A. I went and shut off the water, and later I got another message to shut off the water and I came through and reported that the water was al-

(Testimony of R. E. Beistline.)

ready shut off. I come through and found there was no trouble at all with the flume, that the water was coming over the snowsheds.

Q. You went and made an examination yourself as to whether there was any water coming from the flume between No. 3 tunnel and the mill?

A. Yes, sir.

Q. What did you find?

A. The water was coming over the snowsheds at that time.

Q. And shooting off the flume? A. Yes, sir.

Q. And there was no water coming from the flume at all? A. No, sir.

Q. No place in the flume where there was any water coming out? A. No, sir.

Q. While you were acting as flume tender were there any complaints made to you by persons downtown with reference to the overflowing of the water from the flume at the point where the water comes over the snowsheds?

A. There was several.

Q. That was a matter of rather frequent occurrence? A. Yes, sir. [659]

Q. People talked to you and complained to you that the water was coming from the Alaska Juneau flume at that point? A. They did.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. Who made those complaints?

(Testimony of R. E. Beistline.)

A. I can name two; there was Nels Sorby and Dr. Pallister.

Q. Where is Dr. Pallister now?

A. I don't know.

Q. He isn't here? A. No, sir.

Q. Has the Alaska Juneau Company got any arrangements to shut off the water that comes over the snowshed?

A. No, that isn't corralled at all—that comes from the mountain.

Q. I am asking you if they have any means of shutting that off? A. No.

Q. If anybody telephoned up there to shut that off that wouldn't stop half an hour after the telephone message was sent, would it? A. No.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) That is gulch water that comes down Portal Gulch?

A. Yes, sir.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [660]

Testimony of Edward Dowling, for Defendant.

EDWARD DOWLING, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Edward Dowling.

(Testimony of Edward Dowling.)

Q. Where do you live?

A. Down back of Frank Roberts' place.

Q. You live in Juneau? A. Yes.

Q. Are you working at the Alaska Juneau Company? A. Yes, sir.

Q. What is your line of work—what do you do for the company? A. Flume-tender.

Q. As such flume-tender you look after the Gold Creek flume of the Alaska Juneau Company?

A. Yes, sir.

Q. That is the flume that leads from Gold Creek to the mill? A. Yes, sir.

Q. Were you so employed during the latter part of December, 1919 and the early part of January 1920? A. Yes, sir.

Q. On the 31st day of December, 1919, did you go to that flume? A. Every morning.

Q. Did you go to the penstock?

A. Every morning.

Q. You know where the penstock was situated?

A. Yes, sir.

Q. And the trommel screen? A. Yes, sir.

Q. And you went there on the morning of December 31, 1919? A. Yes, sir. [661]

Q. What did you find when you got there—was the trommel screen running all right?

A. Yes, sir.

Q. Was there any water coming out of it?

A. No, sir.

Q. What time was it?

A. About ten minutes after seven.

(Testimony of Edward Dowling.)

Q. When did you next go to the penstock?

A. Every morning I go to the penstock,—every morning about ten minutes after seven.

Q. On the 31st of December did you go there again that day after you had been there at 10 minutes after seven in the morning?

A. Yes; I came out about half-past two in the afternoon.

Q. Did you go there every morning and afternoon?

A. I visited it twice every day, in the morning and afternoon.

Q. That was part of your regular routine?

A. Yes, sir.

Q. When you first went on duty in the morning?

A. Yes, sir.

Q. And the last thing just before you got off in the afternoon?

A. Yes, sir.

Q. When you got to the penstock on the 31st of December, two days before the slide, what time was it?

A. In the morning?

Q. In the afternoon.

A. I came there about half-past two, I guess.

Q. At that time was there any water running out of the spout?

A. No, sir.

Q. Was the trommel screen revolving?

A. No water running out at all.

Q. There was no water running out and the trommel screen was running?

A. Yes, sir.

Q. The next morning, the day before the slide, the first day of [662] January, did you go there

(Testimony of Edward Dowling.)

again on that morning? A. Yes, sir.

Q. How did you find the trommel screen that morning? A. It was working.

Q. Was there any water coming from the spout?

A. No water at all.

Q. What time was it when you went there that morning?

A. I generally go there just after seven o'clock every morning.

Q. It was just after seven this morning?

A. Ever since I have been on the job.

Q. In the afternoon of the day before the slide you went there again? A. Yes, sir.

Q. At your usual time?

A. About half-past two.

Q. At that time was there any water coming from the discharge spout?

A. No, sir; none at all.

Q. Was the trommel screen running all right?

A. Running all right.

Q. Now, the next morning, the morning of the slide, did you go to the trommel screen?

A. Just after seven o'clock.

Q. When you were there at that time did you examine it? A. Yes, sir.

Q. Was there any water coming from the spout at that time? A. None at all.

Q. Was the trommel screen running?

A. Running, yes.

Q. Running. All right. Now, how much water was there in the flume on the 31st of December

(Testimony of Edward Dowling.)

and the 1st of January, the two days before the slide? A. One inch.

Q. About one inch? [663]

A. Yes, sir.

Q. That is, about one inch at the regulating gate? A. One inch at the gate.

Q. The regulating gate was up how much?

A. One inch.

Q. That is your regular boiler feed supply?

A. Yes, sir.

Q. How much water was there on the morning of the slide, when you went up the flume?

A. One inch.

Q. Just the same as there had been the two days before? A. Yes, sir.

Q. Now, Mr. Dowling, that afternoon, the afternoon of the big slide, did you have any slide up on the flume?

A. I had three slides up toward the dam.

Q. You had three slides up toward the dam?

A. Yes, sir.

Q. Where is the dam situated?

A. It is way up on Gold Creek.

Q. Up toward the Ebner works?

A. Yes, sir.

Q. And there were three slides there that forenoon? A. Yes, sir.

Q. Before noon? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

(Testimony of Edward Dowling.)

Cross-examination.

(By Mr. RODEN.)

Q. On the morning of the slide there was just one inch of water coming in at the gate; is that right?

A. One inch of water coming in at the gate.

Q. How long was it before more water got into the flume?

A. Oh, there was no water got in there at all. When I came in from the dam I found the gate had been raised up— [664] that is the only time there had been any water for a long time in the flume.

Q. How much was coming in then?

A. Seven inches of water.

Q. 7 inches of water was coming in, and the gate was raised to 7 inches?

A. Somebody raised it up, yes.

Q. How far is it from the gate to the dam?

A. Oh, I should judge about half a mile.

Q. And you spent most of your time from, say, about 8 o'clock until 10 or so around the dam?

A. No, no; when I go along I go to my gate, from my gate up to my high line, and from the high line to the dam.

Q. The high line?

A. Yes; that is the tank way up on the hill that furnishes water for the cook-house.

Q. You didn't come back to the gate, anyhow, before say about half past ten?

A. I got back to the gate at 10 minutes to eleven.

(Testimony of Edward Dowling.)

Q. Then where did you go to, Mr. Dowling?

A. I came way up from the flume again.

Q. You came this way then?

A. No, I went up the creek.

Q. When did you come down this way?

A. Come down this way,—well, I came down some time after eleven o'clock.

Q. About how long after eleven?

A. I couldn't say exactly what time it was after eleven—some time after eleven, anyhow.

Q. How much after eleven?

A. I couldn't say—it was some time after eleven—I couldn't tell you how much after eleven it was.

Q. The water was running in the flume, anyhow, when you came down this way? [665]

A. Why, yes; it had been running in the flume for months as far as that goes.

Q. Everything was all right that morning?

A. Everything was all right when I went up, yes.

Q. There was nothing wrong between the gate and the tunnel on this side when you came along there?

A. There was nothing wrong when I went on shift in the morning—everything was all right—nothing wrong at all.

Q. The only thing that happened along there you had some little slides up above the gate?

A. I had two or three small slides up near—close to the dam.

Q. That was close to the gate?

A. Close to the dam.

(Testimony of Edward Dowling.)

Q. Did anything happen between the gate and the penstock? A. No, sir.

Q. Nothing at all? A. I didn't see anything.

Q. You didn't have any slides along there?

A. No.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Dowling, there were no slides there that you know of?

A. Not that I know of—I had been working up at the dam all day.

Q. You don't know what happened along there?

A. No.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. If there had been any you would have seen them?

A. I don't know that I would,—I have my work to do, taking care of the flume.

Q. What you have to do in particular is to walk from the gate to the penstock? [666]

A. I didn't come down to the penstock until half-past two in the afternoon.

Q. How far did you come say around eleven o'clock?

A. I came down to my gate to see how my gate was—the water that furnishes the mill.

Q. Then you came down this way?

(Testimony of Edward Dowling.)

A. Yes, I came along the flume to see how things were working along the flume.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. At that time, Mr. Dowling, did you come down to No. 3 tunnel? A. Yes.

Q. No further? A. No further, no.

Q. You went back up again on the flume?

A. I went back up again on the flume.

Q. Do you know anything about that slide that Kelly had up there?

A. Well, there had been a slide up there—I didn't pay much attention—Mr. Kelly was looking to that.

Q. Mr. Kelly was looking after that and you had nothing to do with it? A. No.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) You never even saw it?

A. No, I never saw it, but I know there was a slide there. Kelly was attending to that—it wasn't any of my business.

Q. (By Mr. RODEN.) You couldn't see it from the track? A. No.

Q. (By Mr. RODEN.) There is a snowshed there? A. There is a snowshed there, yes.

Mr. RODEN.—That is all.

(Witness excused.) [667]

Testimony of Henry G. Davidson, for Defendant.

HENRY G. DAVIDSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Henry G. Davidson.

Q. Where do you live?

A. Alaska Juneau boarding-house.

Q. Are you working for the Alaska Juneau Company? A. I am.

Q. Were you working for the Alaska Juneau Company the latter part of 1919 and January, 1920?

A. The Alaska Juneau.

Q. Were you working for the Alaska Juneau at that time? A. Yes.

Q. What position were you holding with the Alaska Juneau Company at that time?

A. Night watchman.

Q. As night watchman did you have any duties to perform with reference to visiting the penstock?

A. Well, I was supposed to go to the screen and keep all the leaves down out of the spout—sweep it down with a broom.

Q. How many times during the night did your duties call you to the penstock?

A. Once every hour.

Q. Now, on the night of the 30th of December did you go there? A. I did.

(Testimony of Henry G. Davidson.)

Q. During that night during your visits there was there any water running out of the penstock?

A. No.

Q. Was the screen revolving?

A. The screen was going, yes, sir. [668]

Q. Everything was all right? A. Yes.

Q. The next night, the night of the 31st, did you again frequent the penstock as usual?

A. Yes, sir.

Q. Made your visits there during the night?

A. Yes.

Q. What time did you go there the first time at night?

A. Well, get around there about 20 minutes to nine.

Q. A little after nine?

A. It would be about 20 minutes to nine when I would get there. I would ring in at nine—on the hour there.

Q. On that night of December 31st, 1919, during your visits at the penstock was there any water coming from the spout? A. No.

Q. Was the screen revolving?

A. The screen was revolving, yes.

Q. Now, on the night of January 1st did you make your usual visits to the penstock?

A. Yes, sir.

Q. At that time during any of your visits there was there any water coming from the spout?

A. No, sir.

Q. Was the screen revolving?

(Testimony of Henry G. Davidson.)

A. The screen was revolving, yes, sir.

Mr. HELLENTHAL.—That is all.

(By Mr. RODEN.)

Q. You never saw any water coming from the spout? A. No.

Q. How do you make your rounds there, Mr. Davidson?

A. I go along the tramway there from the hoist to the penstock every hour, and ring up the clock at each end—I ring up [669] a clock in the dry-room as I go through to the penstock.

Q. How often did you do that?

A. Once every hour.

Q. How far do you have to go from the penstock to the place you ring in?

A. Go through the door and to the next building is all—about 12 feet.

Q. You have never seen any water come from the penstock? A. No, sir.

Q. Doesn't a little water come through there all the time? A. Through where?

Q. Through the spout.

A. Very little—just spatters if there is any.

Q. All the time?

A. Not all the time—just working the leaves out of the end of the screen there to the left of the spout, that is all; it isn't enough to take off the leaves because I have to go around there,—the first thing I examine my machine—the revolving machine here, then I go outside,—if it is all right there, I go outside on the platform and there is a

(Testimony of Henry G. Davidson.)

broom laying there for that purpose, to pull down the leaves, and the dry leaves won't go down there unless you work it down with this broom—take it down to the end of the spout.

Q. You have never seen that screen stop?

A. I seen it stop once.

Q. When was that?

A. That was in the summer,—I don't know—

Q. Which summer?

A. During the summer months.

Q. The summer before the slide? A. Yes.

Q. What stopped it? A. The belt was broke.

Mr. RODEN.—The belt was broke—that is all.
[670]

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. There was no water coming through there then? A. No water.

Q. The water went right through the screen just the same? A. Yes?

Q. And no water was coming from the spout?

A. No.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. And the trommel was running?

A. No, the belt was broke and that afternoon it was fixed.

Q. Was the motor running then?

A. Out of the spout?

Q. Yes. A. No.

(Testimony of Henry G. Davidson.)

Q. The motor that runs the trommel screen.

A. Yes, the motor was running.

Q. So a man passing the trommel screen might hear the motor running and the trommel screen be stopped?

A. No—a small motor at the side of it—it don't make much noise.

Q. Can't you hear it when you pass by there?

A. The little motor?

Q. Yes. A. I don't know as you could.

Q. Can you hear it?

A. Sure I could hear it, but I knew that the trommel screen was stopped when I was coming along the top there.

Q. But I mean ordinarily when you pass there, or a man passes there, he can hear the motor run, can't he?

A. I don't know—it is a small motor—it runs quiet.

Q. And a man might pass there and not hear the motor running? [671]

A. If the trommel screen is running you can hear that a quarter of a mile away.

Q. A quarter of a mile away?

A. A good distance, anyway—you would know what it was.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of D. F. Kelly, for Defendant.

D. F. KELLY, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. D. F. Kelly.

A. Where do you live? A. Juneau.

Q. How long have you lived here?

A. About 8 years.

Q. Before that time you lived in Douglas, didn't you?

A. Oh, yes; I have lived in Douglas for 12 or 13 years.

Q. You have been in Aalska a good many years?

A. Twenty-two.

Q. Did you ever work for the Alaska Juneau Company? A. Yes.

Q. Were you working for that company on the 2d day of January, 1920, the day of the slide?

A. Yes, sir.

Q. What position were you holding with the company at that time?

A. I am supposed to be track man and look after the track.

Q. You look after the track? A. Yes.

Q. And that is what you were doing on that morning? [672] A. Yes, sir.

Q. In the morning of that day, the morning of

(Testimony of D. F. Kelly.)

January 2, 1920, what time did you go to work?

A. I went to work at 7 o'clock.

Q. Where did you go to work—what was the first thing you did?

A. The first thing I done was to fix up a switch near the tippie.

Q. Then what did you do?

A. Then I went over to near the change room to cut some holes for to let down the water that was seeping through there from the snowshed on to the track—to let it through there so it wouldn't form an iceberg on the track. What is known as the old portal was used at that time as a side track.

Q. Was there much water running at that time?

A. There was a good deal of water running over the snowshed and also running in over this floor that constitutes the track.

Q. What did you do to take care of that water?

A. I took an ax and cut some 15 or 20 holes there, and cleaned out the rails, and then stepped through the change room and went out to the hurdy-gurdy and took a look at it.

Q. What do you mean by the hurdy-gurdy?

A. That is the trommel screen, I believe is the scientific name for it.

Q. That is the big affair there in the penstock?

A. The common name among us roustabouts was the hurdy-gurdy.

Q. You went to the hurdy-gurdy about that time, Mr. Kelly?

A. About 8:30—I don't look at my watch or time

(Testimony of D. F. Kelly.)

myself, but when I got over to the blacksmith-shop it was 10 minutes after nine—allowing myself half an hour to go there would be 8:30—somewhere along there.

Q. When you went to the hurdy-gurdy did you see whether it was running all right?

A. I did—I stepped right down and saw that it was running all right.

Q. Taking care of the water all right? [673]

A. There was very little water coming.

Q. But it was taking care of whatever was coming? A. Yes, running all right.

Q. Was there any water running out of the spout? A. Not that I could see.

Q. Did you examine the spout itself at that time?

A. Not in particular—I just looked at the screen and it was going all right—there was very little water—it was running all right—no overflow of any kind.

Q. Everything was in good order? A. Yes.

Q. Then where did you go?

A. I went from there, as I said, to the blacksmith-shop; from there in to the Gold Creek tunnel where I was surfacing track.

Q. Then that forenoon did you go back to the north portal of No. 3 tunnel?

A. Well, yes; I had been working probably an hour or so when the master mechanic come in and told me there was a slide come down on the flume at the north portal of No. 3 tunnel and for me to go up and clean it out.

(Testimony of D. F. Kelly.)

Q. Did you go there then? A. Yes, sir.

Q. Did you take a couple of men with you or did you go alone? A. I took two men with me.

Q. What time was it when you got to the north portal of No. 3 tunnel, Mr. Kelly—about what time?

A. About 11 o'clock.

Q. After you got there what did you find?

A. I found that a slide of mud or rocks or dirt, etc., had come down there and filled the intake of the flume—filled up the two wings so that the water was running over—running into the tunnel and from there into the flume.

Q. Into the main flume?

A. Into the main flume, yes. [674]

Q. The flume that was filled by the slide, that wasn't the main flume?

A. No; it was a side flume that run from there into the penstock and from that down into Gold Creek.

Q. That was a side flume that was built to take care of surface water of the sidehill, to keep it from getting into the main flume? A. Yes, sir.

Q. And it ran into a little penstock and that was connected with a gutter that ran down into Gold Creek? A. Yes, sir.

Q. So as to take care of that surface water?

A. Yes, sir.

Q. And that flume had been filled up?

A. Yes, sir.

Q. As a result of that what, if anything, in the way of leaves and stuff found its way into No. 3 tunnel?

(Testimony of D. F. Kelly.)

A. It was carrying dry leaves and rubbish of that kind right with it into No. 3 tunnel.

Q. And that got into the main flume?

A. Ran right into the main flume; yes.

Q. Now, Mr. Kelly, I show you a picture and direct your attention to the snowsheds at the portal of No. 3 tunnel—this is marked Defendant's Exhibit No. 3, and I will ask you whether there was that much water coming over those sheds that morning,—did you notice the sheds that morning?

A. Oh, yes; I went there for that purpose, to get rid of that water, because I had had trouble with it before.

Q. Was there that much water running that morning over the snowsheds—that much water more or less running?

A. I would think from the appearance of that that there was more water—it looks to me here to be one little stream of water but that morning there was quite a sheet of water along the snowsheds running over. [675]

Q. That morning, Mr. Kelly, was it raining?

A. Oh, we will say that that is all right rather than have any dispute about it,—we will call that thing all right.

Q. That shows the conditions there except if anything there was more water?

A. Yes; I don't think that you would go to Hades for that.

Q. Was it raining that morning?

A. Yes, raining hard.

(Testimony of D. F. Kelly.)

Q. Was there any snow on the ground above the track? A. Yes.

Q. What was the snow doing?

A. Melting and running down.

Q. Causing a flood of water in the gulch?

A. Yes; causing a flood of water to come over the snowshed and on down into the gulch, yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Now, Mr. Kelly, you had seen it rain just as hard as it was raining this morning a good many times before that, hadn't you?

A. Oh, yes; I have seen it rain as hard on one or two occasions as it was then,—the day of the real estate lowering affair it rained awfully hard.

Q. The day of what?

A. The day of the real estate lowering affair—the time it cut up the caper down in Gold Creek. I had an \$800 lot and I have been trying to sell it for \$250 ever since so I have always called it a real estate lowering. If that isn't the proper name for it I don't know.

Q. It was raining hard that day?

A. Yes, it was raining hard that day, and it was raining about 11 o'clock, when I went up there, about as hard as it was on [676] the real estate lowering affair—that is my judgment of it.

Mr. RODEN.—That is all.

Q. (By Mr. HELLENTHAL.) When the real

(Testimony of Charles Smith.)

estate was lowered there was no snow on the ground either, was there?

A. It causes me a bitter taste in my mouth to speak of that.

Mr. HELLENTHAL.—All right; that is all.

(Witness excused.)

Testimony of Charles Smith, for Defendant.

CHARLES SMITH, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Charles Smith.

Q. Where do you live?

A. I live out on Salmon Creek road a ways.

Q. Are you working for the Alaska Juneau Company? A. Yes, sir.

Q. Were you working for the Alaska Juneau Company in the latter part of December, 1919, and the early part of January, 1920? A. Yes, sir.

Q. On the 31st of December, 1919, about what time in the morning did you go to work?

A. Well, it was about 7 o'clock—pretty close to seven.

Q. In going to work—do you know where the penstock of the Alaska Juneau Company was, the one that is referred to in this case? A. Yes.

Q. Near the portal of No. 3 tunnel? A. Yes.

Q. At that time as you went to work did you pass

(Testimony of Charles Smith.)

the penstock? [677] A. Yes, sir.

Q. How far from the spout did you pass?

A. Well, I judge it was about six—between six and seven feet.

Q. The trail leads right past it? A. Yes.

Q. That was at about what time, Mr. Smith?

A. That was about, between 5 and 10 minutes to seven.

Q. Now, at that time was there any water coming from the spout at the penstock as you passed?

A. No, sir.

Q. Was the penstock running all right—revolving? A. The screen was revolving, yes.

Q. The screen was revolving in the penstock. That afternoon what time did you come from work?

A. It was around 4 o'clock.

Q. When you passed there on that occasion was there any water coming from the spout?

A. No, sir.

Q. You again passed there about 4 o'clock—you came down that same trail?

A. Yes, I came down that same trail.

Q. Was the screen revolving at that time?

A. Yes, sir.

Q. The screen made a lot of noise, didn't it?

A. Yes, it made a lot of noise.

Q. If it had stopped you would have been attracted to it by the fact that it was silent—isn't that it? A. Yes.

Q. It made a great deal of noise?

A. Yes; and in passing you get used to it, and if

(Testimony of Charles Smith.)

it would stop you would naturally notice it.

Q. On the morning of January 1st, the day before the slide, did you go to work again?

A. Yes, sir. [678]

Q. At that time did you pass the trommel-screen house? A. Yes, sir.

Q. What time in the morning was it?

A. It was right around 7 o'clock, pretty close.

Q. Was there any water coming from the spout at that time when you passed there? A. No, sir.

Q. Was the screen revolving?

A. It was revolving that morning, yes, sir.

Q. On the afternoon of the 1st of January, the day before the slide, what time did you come from work? A. Right about 4 o'clock.

Q. Now, as you came from work did you again pass the trommel-screen house? A. Yes, sir.

Q. And was there any water coming from the spout at that time? A. No, sir; I didn't see any.

Q. Was the screen revolving?

A. It was revolving, yes.

Q. On the morning of the slide at what time did you go to work?

A. About 7 o'clock—about the same time every morning.

Q. About the usual time? A. Yes.

Q. Did you again pass the trommel-screen house on your way to work? A. Yes, sir.

Q. At that time was there any water coming from the spout? A. No, sir; I didn't see any.

Q. Was the screen revolving?

(Testimony of Charles Smith.)

A. Yes, it was revolving.

Q. You have been passing there, Mr. Smith, ever since, daily, haven't you, twice a day?

A. No, not ever since.

Q. For how long? [679]

A. Well, I quit there in March, I guess it was, after that, and I started to work again in December.

Q. Well, anyhow, until March of that year you passed there twice a day? A. Yes.

Q. Did you ever observe any cut or trench leading from the trommel screen spout down the hillside there? A. No, sir, I did not.

Q. If there had been any such thing there would you have seen it from the trail by which you went?

A. I certainly would.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Now, when you passed on the morning of the 2d were you alone or was anybody with you?

A. Well, I couldn't just say—there was lots of times I caught up with someone or someone would catch up with me.

Q. You remember pretty well what happened that morning and you ought to be able to remember that too.

A. Not in that particular case. A good many mornings you would catch up with some fellow or some fellow caught up with you.

Q. Have you ever seen that trommel screen stop at any time? A. Yes, I have seen the screen stop.

(Testimony of Charles Smith.)

Q. How often?

A. Well, I judge I have seen it stop a couple of times.

Q. The day of the slide when did you come out of the mine?

A. I came out between one and two o'clock, I think.

Q. You don't remember whether there was any water in the ditch at that time or not?

A. Which ditch do you have reference to?

Q. The ditch coming through the tunnel there?

A. No, I don't. [680]

Q. You don't remember that? A. No.

Q. You don't remember whether there was any water in the flume at that time or not? A. No.

Q. Do you remember whether the trommel was stopped at that time?

A. I don't remember that.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Fred Holmquist, for Defendant.

FRED HOLMQUIST, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Fred Holmquist.

Q. Where do you work?

A. I am not working now.

(Testimony of Fred Holmquist.)

Q. Where were you working at the time this slide happened on January 2, 1920?

A. The Alaska Juneau.

Q. On the morning of the 31st of December, two days before the slide, did you go to work?

A. Yes, sir.

Q. You did not pass by the trommel screen going to work, did you?

A. No, I didn't—I took the tramway.

Q. But coming back from work every day you passed there? A. Yes.

Q. On the 31st what time was it that you passed the trommel screen—December 31st, two days before the slide? A. About 4 o'clock. [681]

Q. When you passed there at that time was there any water coming from the spout of the trommel screen? A. No.

Q. On the next day you passed there again in the afternoon? A. Yes.

Q. Was there any water coming from the spout at that time? A. No.

Q. You didn't pass there the morning of the slide?

A. No, I didn't pass there the morning of the slide.

Q. Now, on the night of January 1st where were you living? A. At John Holmquist's house.

Q. Living at your brother's house? A. Yes.

Q. Where is that situated with reference to Portal Gulch—where is that house?

A. It is right over at Gastineau Avenue, across

(Testimony of Fred Holmquist.)

over from the General Hospital, right below No. 3 tunnel.

Q. Right below the mouth of No. 3 tunnel which is situated right in what is called Portal Gulch, or do you know where that is? A. What?

Q. Do you know where Portal Gulch is?

A. No, I am not—

Q. Anyhow the house is situated right in that gulch that comes down from the mouth of No. 3 tunnel; is that right?

A. Yes; you see the house is a little closer to the General Hospital than she is to the administration building—it is a little further over, and a canyon coming down there and a creek coming down alongside of John's house too.

Q. Comes right alongside of the house?

A. Yes; just about 7 or 8 feet from the corner of the house.

Q. How much water was there running in that creek on January 1st, the night before the slide, when you came home that night? [682]

A. The night before there was a whole lot of water coming down because I remember when I went to bed in the evening it was making a noise; I was sleeping in the corner right close to the creek and I had the window open, and they have a plank bottom in the flume that the city made up there, and the small rocks were rolling in the flume, making a noise so I couldn't hardly sleep—in the evening there was a lot of water coming down, and John used to go out and clean out the small leaves and rocks that blocked it up there.

(Testimony of Fred Holmquist.)

Q. Was there ever any other time when there was as much water as there was that night, that you remember?

A. I couldn't say exactly—I remember some time before but I couldn't say when.

Q. But this was more water than you had had there for a long time?

A. Yes; it was more than we had for a long time there.

Q. And was it more water than you have seen since then?

A. I never see that much water there before that I noticed.

Q. And you have never seen that much there since? A. No, I don't think so.

Q. Did you notice the water running off the snowsheds that day?

A. No, I didn't look up that way.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. The snowsheds are right above your house, aren't they?

A. Right above where I was living at that time—a little further over this way.

Q. But you didn't look up?

A. No, I didn't look up that way.

Q. Have you ever seen any water run over the snowsheds?

A. Yes; when I pass by now, when I am up in the Alaska Juneau boarding-house, when I go up every

(Testimony of Fred Holmquist.)

night and come down every morning I see the water.
[683]

Q. Is there water coming over the snowsheds to-day?

A. I didn't look up that way—I couldn't say.

Q. When did you quit working for the Alaska Juneau Company?

A. I think it was day before yesterday—the 20th, I think.

Q. Your contract expired, of course?

A. No, we didn't finish.

Q. Your brother is still up there, isn't he?

A. Yes, he is up there.

Q. John? A. Yes.

Q. He is foreman, isn't he? A. Yes.

Q. And the other brother is up there, Axel?

A. Yes.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of George W. Saum, for Defendant.

GEORGE W. SAUM, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. George W. Saum.

Q. Where do you live? A. Juneau.

Q. Where are you employed?

A. Alaska Juneau mine.

(Testimony of George W. Saum.)

Q. Were you working for the Alaska Juneau Company on January 2d, 1920?

A. I was. [684]

Q. And you had been working there for some time before that? A. Yes, sir.

Q. On December 31st, two days before the slide, did you go to work that morning? A. I did.

Q. In going to work did you pass the trommel-screen house? A. I did.

Q. At about what time?

A. About 10 minutes to seven, I suppose.

Q. At that time was there any water coming from the spout at the trommel screen? A. No.

Q. On that day, the 31st of December, 1919, did you pass that place again coming from work?

A. I did.

Q. At what time? A. About 4 o'clock.

Q. Now, as you came down on that occasion was there any water coming from the spout? A. No.

Q. Was the screen running all right?

A. It was.

Q. The screen was running and making a lot of noise?

A. Yes; it made quite a lot of noise revolving.

Q. Now, the next day, the day before the slide, did you again go to work in the morning?

A. I did.

Q. At about what time?

A. Ten minutes to seven.

Q. Did you pass the trommel-screen house on your way to work that morning? A. I did.

(Testimony of George W. Saum.)

Q. Was there any water coming from the spout when you passed then? A. No. [685]

Q. That afternoon, the afternoon of the day before the slide, did you again pass the trommel-screen house coming from work? A. I did.

Q. At about what time?

A. It was a little before 4 o'clock that day.

Q. Was there any water coming from the spout when you passed then? A. No.

Q. On the next morning, the morning of the slide, did you pass the trommel-screen house on your way to work? A. I did.

Q. At about what time did you pass the trommel-screen house? A. Going to work?

Q. Yes. A. About ten minutes to seven.

Q. Was there any water coming from the spout of the trommel-screen house at that time?

A. No.

Q. How far from that spout is the trail that you passed over on these various occasions?

A. About 5 to 8 feet, something like that.

Q. A short distance—if there had been any water coming from the spout down there you would see it in going up and down the trail? A. Yes, sir.

Q. Could you possibly have missed seeing it?

A. Couldn't easily miss it looking right at it.

Q. You were looking right at it as you would go up the trail? A. Yes, sir.

Q. Now, Mr. Saum, there are some rocks lying about in the vicinity of that spout concerning which there has been some controversy,—do you know

(Testimony of George W. Saum.)

whether they were placed at that point before or after the slide?

A. It was quite a little—I saw rocks placed there before the [686] slide.

Q. They were there then at the time the slide happened?

A. Those rocks I saw about there were; yes.

Q. What rocks did you see about there?

A. I saw a man repairing the trail and piling the rock down there one afternoon when I was coming out of the mine—throwing the rock down on a little flat place there by the trommel screen.

Q. What was the name of the man you saw doing that? A. Mr. Kirk.

Q. Owen Kirk? A. Yes, sir.

Q. You are sure that was before the slide happened? A. Quite a while; yes.

Q. You have lived in this country quite a while, haven't you, Mr. Saum? A. About 30 years.

Q. Do you know of any slides that have happened in the vicinity of where this slide happened on January 2, 1920?

A. Yes, I know of two different slides down there.

Q. I wish you would tell the jury where those slides occurred.

A. There was one of them landed in Forrest's machine-shop—that was the first one that came down; and there was another one came down that landed just a little below, part of it a little below where Goldstein's present store is, which wrecked some of his cabins, and part of it landed down where the old Dispatch building is.

(Testimony of George W. Saum.)

Q. Another one happened by the old Dispatch building?

A. Yes, where the concrete building is.

Q. The slide at the Forrest machine-shop would be quite a little ways this side of where that recent slide occurred?

A. Well, it started about where Sharick's residence is at the present time.

Q. Up in that neighborhood? [687]

A. Yes, sir.

Q. How long ago was it that that happened?

A. I couldn't say what year—it was quite a while ago.

Q. The slide that was right above the Goldstein house—the Goldstein store, on that street, that you have referred to, when did that happen?

A. Well, it happened shortly after those cabins were built in there the other side of Mr. Goldstein's store.

Q. There were some cabins built in there and shortly after that there was a slide?

A. And when it landed down in the other place, where the Dispatch building is now, there was a man living in there named Johnson—they used to call him Ice Johnson—living in the cabin at that time—that is where the Dispatch building is now built.

Q. You remember that slide? A. Yes, sir.

Q. That was about how many years ago?

A. Oh, it is quite a number of years ago, but I couldn't say just exactly how long it was.

(Testimony of George W. Saum.)

Q. You remember, then, at least three slides in that neighborhood during the past 25 or 30 years?

A. Yes; I remember the slide in the Forrest shop because I was called there to help take out some rocks and stumps that had gone into the shop, and I went there to help clean it out.

Q. Do you remember when the Gastineau Hotel was built? A. Yes, sir.

Q. Where were you living at that time?

A. I was living right up the steps back of the Gastineau.

Q. Do you remember when they made an excavation there? A. Yes, sir.

Q. What, if anything, happened at the time that excavation was made? [688]

A. Well, when the excavation was made the ground began to slide in up there at different places.

Q. How did it affect the house where you were living?

A. Well, the house I was living in was wrecked pretty bad from the slide, so we couldn't open or close any doors in the house, and the chimneys were both broken in two.

Q. That house was standing up on the hillside some distance away from the excavation?

A. It was standing back on Gastineau Avenue, I believe they call it now.

Q. It was back about 100 feet, back of the excavation? A. Yes, somewhere along there.

Q. Then what did the Gastineau people do to keep the dirt in place?

(Testimony of George W. Saum.)

A. They put in a bulkhead.

Q. Do you know of any other excavations that have been made that have caused the ground to start to move?

A. I don't really know of any other excavations that have caused any trouble, where a slide happened.

Q. Those were the only ones that came under your observation? A. Yes, sir.

Q. Bulkheads are generally put in where excavations are made? A. Yes, sir.

Q. As soon as possible? A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. How high was that cut that was made at the Gastineau Hotel—how deep?

A. How deep was the cut on the face of the cut?

Q. Yes.

A. At that time about 12 feet, I should judge.

Q. Wasn't it considerably more than that? [689]

A. Well, I never measured it, but I should judge, passing over it, that was about what it was.

Q. That began to slough in?

A. I don't think it exceeded that very much.

Q. That began to slough in?

A. It undoubtedly did.

Q. And the slide that you speak about that happened up at Sharick's, that came down the gulch, didn't it?

(Testimony of George W. Saum.)

A. Came down the gulch—no; it came from the adjoining lots right back of it—you are speaking of the time they were doing the excavating?

Q. No, I am talking about the time you are speaking of the slide that happened around Sharick's residence—you spoke about a slide at Sharick's residence? A. Sharick's?

Q. Whose residence was it you spoke about?

A. I didn't speak about any slide at Sharick's place. I said one slide that came down in the Forrest shop started up by where Mr. Sharick's residence is now.

Q. That came down a ravine, didn't it?

A. No, there is no ravine there.

Q. You testified in the case of Koski against the Alaska Juneau Company, didn't you? A. I did.

Q. Didn't you say then that this slide you refer to now as coming from the neighborhood of Sharick's residence came down a draw?

A. Came down a draw?

Q. Yes. A. No, sir, I don't think so.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. There was another slide that occurred that came down above [690] Sharick's residence and came through there in that same neighborhood, wasn't there? A. Come through the same—

Q. There was a slide that came down the gulch near Sharick's residence at one time, 20 or 30 years ago, wasn't there?

(Testimony of George W. Saum.)

A. There was a small slide came down along where the old Russian Baths used to be.

Q. That was 20 or 30 years ago? A. Yes.

Q. That came down the gulch near Sharick's house? A. Yes.

Q. But that is a different slide than the one you cleaned out of Frank Forrest's machine-shop?

A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Charles Bland, for Defendant.

CHARLES BLAND, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Charles Bland.

Q. At the time of the slide on January 2, 1920, were you working for the Alaska Juneau Company?

A. Yes, sir.

Q. What were you doing?

A. Running a motor.

Q. Where were you at the time the slide happened? A. Between the mill and No. 3 tunnel.

Q. At what point—what do you call that—the tipple? [691]

A. No, I was between the tipple and the No. 3 tunnel, about halfway.

(Testimony of Charles Bland.)

Q. Did you see the ore train coming on that occasion? A. Yes, sir.

Q. How do you know when the slide happened?

A. The ore train—the motor had switched around and there was a big blue flash come just after the ore train pulled in.

Q. As the ore train pulled in there was a big blue flash on the hillside? A. Yes, sir.

Q. You saw that flash? A. Yes, sir.

Q. At the time that flash happened what happened to the power? A. The power went off.

Q. The power was off of everything after that?

A. Yes, sir.

Q. There was one big flash?

A. There was one big flash.

Q. And that was just after the ore train ran into the tippie? A. Yes, sir.

Q. How long did it take the ore train to run from the point where the two tunnels come together to the tippie? A. About 4 or 5 minutes.

Q. You are an engineer—a motorman on these cars? A. Yes.

Q. You run a service motor? A. Yes.

Q. You have been on the ore train, I suppose?

A. Yes, sir.

Mr. HELLENTHAL.—That is all. [692]

Cross-examination.

(By Mr. RODEN.)

Q. Where were you at the time of the slide?

A. Right at the top of the hill.

(Testimony of Charles Bland.)

Q. At the tippie?

A. No, halfway between the tippie and the No. 3 tunnel.

Q. That would be a matter of about 2 minutes, would it? A. From No. 3 to where I was?

Q. Yes. A. About that—it wouldn't be that.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. What do you mean—that it would take you and your motor about two minutes to run from No. 3 tunnel to where you were?

A. No, it wouldn't take a minute.

Q. With the motor? A. No, sir.

Q. With your service motor? A. No, sir.

Q. With an ore train it would take a little longer?

A. Take a little longer than that.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. Were you running a motor or train at that time?

A. At that time I wasn't running nothing—I was standing still.

Q. When you moved did you move on a train or a motor? A. I was on a motor.

Mr. RODEN.—All right—that is all.

(Witness excused.) [693]

Testimony of Wert Newman, for Defendant.

WERT NEWMAN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Newman, where were you employed on January 2d, 1920? A. Alaska Juneau.

Q. In what department?

A. Electrical department.

Q. On that morning where were you during the early part of the forenoon?

A. Up at the Jualpa substation.

Q. That would be in the Jualpa Basin?

A. Yes, sir; there and the shop together.

Q. What did you do in the forenoon in the way of starting down towards town?

A. We had an electrical disturbance in the substation around 9:30—we had a disturbance before that—the compressor man calls me down there, that there is something wrong with the high line and told me to come down to the compressor; so when I went down to the compressor—that is the compressor in the substation—the lights was flickering; they would go down low and then they would come back up again, and the telephone bell was ringing—the juice was leaking through the high line, was what I thought it was, and was causing the bell on the telephone to ring.

(Testimony of Wert Newman.)

Q. Everything was out of gear?

A. Everything was out of gear—you couldn't get the power-house to find out anything.

Q. That was between 9 and 10 o'clock in the morning? A. Yes, sir.

Q. After that what did you do in the way of going down towards town? [694]

A. I started down over the line—it was just before 10 o'clock.

Q. Who sent for you to go over the line?

A. Earl Higgins.

Q. He is the chief electrician? A. Yes, sir.

Q. What line did you go over?

A. Over the Alaska Juneau transmission line.

Q. That is the line running from the Basin to the power-house on the Juneau beach?

A. Yes, sir.

Q. On your way downtown did you pass the place where the slide afterwards occurred? A. Yes, sir.

Q. Just before you got to the slide, or before you reached the slide, did you see any flashes?

A. No, sir.

Q. Now, just before you got to the slide what kind of country did you go through with reference to whether you could see flashes on the hillside ahead of you?

A. Well, a flash could occur ahead of you and you wouldn't see it—you would go down in ravines and back out of them.

Q. And there was brush on the ground, too?

(Testimony of Wert Newman.)

A. Not so much brush—stumps and logs, and draws to go into.

Q. There is a little space, though, just before you get to the slide where you would see them, isn't there? A. Yes, sir.

Q. Did you see any when you were passing through that space? A. No, sir.

Q. As you went through that space did you look up in the direction of the trommel screen?

A. Yes, sir.

Q. What did you see at the trommel screen?

A. There was some water coming out of the trommel screen. [695]

Q. How much water was coming out of there?

A. I wasn't looking straight into the stream—I wasn't looking into it—I was quartering the stream from where I was.

Q. Can you give me an idea whether there was much water coming or little water coming?

A. From where I was looking at the stream, the stream looked round—it looked to me like it was about 4 inches, or the same size as my leg is, is about the size the stream would look.

Q. How would the stream that came from there come through a 12-inch box?

A. A 12-inch box, I think, would carry more water than was coming through there.

Q. It would carry more water, wouldn't it?

A. Yes, sir.

Q. A good deal more?

A. I think a 4-inch pipe hitting down from the

(Testimony of Wert Newman.)

trommel screen would carry all the water that was coming through there.

Q. And a 12-inch box on that same level would carry all the water that was coming through there?

A. Yes, sir.

Q. And would carry a great deal more.

A. Yes, sir.

Q. Then where did you go—did you continue on your way examining the power line?

A. Yes, into the power-house.

Q. Did you cross over the slide area?

A. Yes, sir.

Q. As you crossed over the slide area was there any water running down over the surface of the ground?

A. No, sir, nor more than there was anywhere else on the hillside.

Q. Was the ground just the same as the ground you passed between the—

A. Not any more water at this place than you would find anywhere [696] else on the hillside because there was water everywhere.

Q. Was there any stream of water coming down over that hog-back at all?

A. No, sir—well, I didn't go over the apex of the slide—I followed right where the pole line goes there.

Q. I mean along the line that you went?

A. Yes, sir.

A. You followed the pole line? A. Yes, sir.

Q. That is the Alaska Juneau pole line?

(Testimony of Wert Newman.)

A. As near as I could.

Q. And that would take you across the slide area along the line that I am now marking with my pointer?

A. I might be 5 or 6 feet below that line or above it, if the trail is on the other side of it—whichever side the best walking was I would be on that side of the trail.

Q. And that power line leads along just below the word “slide” as it appears on this map?

A. Yes, sir—down below it, yes, sir.

Q. And that is the place where you crossed at that time? A. Yes, sir.

Q. And you say there was no surface water running over that place?

A. Not any more than there was anywhere else on the hillside.

Q. What I mean is there was no stream of water?

A. No, sir.

Q. The surface was no different—

A. The surface was just about the same thing—the sloughs were full of water. I had got my feet wet before I got to there—I got my feet wet before I got out of the Basin in Gold Creek—I got wet up there when I first started out and I didn’t pay any attention to it after that.

Q. When you speak of sloughs you mean gulches where the water would come down?

A. Where the gulches would come down this way.
[697]

Q. Between those two gulches there was no

(Testimony of Wert Newman.)

water running over the surface?

A. No more than anywhere else.

Q. The surface conditions were the same as they were anywhere else?

A. As far as I saw them,—all over the surface it was the same.

Q. What do you do when you examine the line?

A. When I come to a tower I would go where I could see where the high line was tied to the insulator, and I would look to the end of the tower—look to the next tower—you can see through your lines right ahead—to see whether it cleared into the next tower or not, and then I would pay no more attention to the line until I would get to the next tower.

Q. And then you would do the same thing from there to the next tower?

A. Yes, do the same thing.

Q. And you followed the line down that morning that way? A. Yes, sir.

Q. Did you find anything wrong with the line?

A. No, sir; I reported in the power-house when I got to the power-house that the line was clear—I found nothing on it.

Q. Did you examine the Gastineau line while you were going along? A. No, sir.

Q. You don't know what condition it was in?

A. No, sir.

Q. You went right down to the power-house then?

A. Yes, sir; the same as any other line—as soon as we examine a tower we look through to the next

(Testimony of Wert Newman.)

tower, and would go to the power-house and examine it.

Q. When you got to the power-house did you see Earl Higgins there?

A. He wasn't there when I got there.

Q. How long after you got there did Earl Higgins come in? A. That is pretty hard to say.

[698]

Q. Ten or fifteen minutes, or something like that?

A. I would judge 10 minutes—12 minutes—something like that—10 or 15 minutes.

Q. After you met Earl Higgins there where did you and Earl go, if anywhere?

A. Well, I told him the line was clear and I was going back up to the Basin where I work. Well, he said he was going up—he says, “Come on, we will go up here and up where the slide was.”

Q. Where did you go?

A. We went down the street to the first street leading down this side of the General Hospital—we went around that street, went around the administration building and followed up by this slide area.

Q. Now, when you went up there, Mr. Newman, did you see any water coming over the snowsheds?

A. Yes, sir.

Q. How much water was there coming over there?

A. There was quite a bit of water coming over the snowsheds.

Q. Was there enough water so it would fall down on the water flume and spout off of that in a sheet?

(Testimony of Wert Newman.)

A. Yes, sir; when it would strike this flume it would kind of bust the stream and it would throw out kind of a wide looking spread.

Q. How would it look to anyone who didn't know the situation up there as to where the water was coming from?

A. It looked as though it was coming from the flume.

Q. And you observed that that morning as you went up the hill? A. Yes, sir.

Q. After you got to the trommel screen house did you look around where the spout was to see whether there was any evidence of running water on the ground?

A. No more than leaves and grass and stuff there.

Q. You could see that water had been running?
[699] A. Yes, sir.

Q. Was there any cut in the ground?

A. No, sir; none that you could notice.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Where were you at the time of the slide?

A. I don't know—I don't know what time the slide come in.

Mr. HELLENTHAL.—There is just one question I want to ask the witness. Mr. Newman, after you passed the slide area going towards the power-house your back was turned towards where the slide happened? A. Yes, sir.

Q. (By Mr. HELLENTHAL.) And you didn't

(Testimony of Wert Newman.)

notice anything more about it? A. No, sir.

Q. (By Mr. RODEN.) Well, about what time was it that you went up with Earl Higgins, up to the trommel screen?

A. Got to that trommel screen—if I remember right it was 10 minutes to twelve o'clock.

Q. As near as you know now, you must have been somewhere between the slide area and the powerhouse when the slide happened?

A. Well, I could have been right there somewhere or other—I don't know just where I could have been at that time.

Q. How long did you stay up around the trommel screen there, Mr. Newman?

A. Oh, probably three minutes.

Q. And the snowshed water was running?

A. Yes, sir.

Q. In good shape? A. Yes, sir.

Q. And did that quit running about half an hour after you were up there? [700]

A. I don't know anything about it—I went right through into the Basin.

Q. Do you know whether or not the Alaska Juneau could shut that off?

A. They have got no way to shut it off—not the surface water coming over the mountains.

Q. How long did you see the water running out of this trommel screen coming down?

A. What is the question?

Q. For how long a period of time did you see this water coming out of the trommel screen after

(Testimony of Wert Newman.)

you got up to the trommel screen?

A. There wasn't any running out of there when I got up there.

Q. Where was the water going to then?

A. There was none running out of the screen when I went up to it.

Q. Was there any in the ditch and flume?

A. I don't know whether there was or not—I wasn't attending to the ditch.

Q. I know you weren't—anyway you didn't see any water. You were up there for say three or four minutes at about 10 minutes to twelve and you saw no water running out of the trommel screen then? A. No, sir.

Q. About how long before you went up to the trommel screen had you seen this water coming out of the spout?

A. I couldn't judge—I couldn't tell you.

Q. You can give us an idea?

A. A little after eleven o'clock, then.

Q. A little after eleven? A. Yes, sir.

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock of the following morning.) [701]

MORNING SESSION.

April 1, 1921, 10 A. M.

Testimony of Robert E. Murphy, for Defendant.

ROBERT E. MURPHY, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: .

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name? A. Robert E. Murphy.

Q. Where do you live, Mr. Murphy?

A. Gastineau Hotel.

Q. In Juneau? A. Juneau.

Q. Were you residing here at the time of the slide on the 2d of January, 1920? A. I was.

Q. And for some time after that? A. Yes, sir.

Q. Where was your office at that time?

A. In the Pond building.

Q. Where is that situated in Juneau, on Front Street? A. On Front Street.

Q. Where is it with reference to the place where the slide occurred?

A. It is about half a block below where the slide came down.

Q. Half a block further down channel?

A. Further down the channel, yes.

Q. At the time of the slide you were up town, weren't you?

A. I was just about in front of Behrend's bank.

Q. You didn't see the slide?

(Testimony of Robert E. Murphy.)

A. I didn't see the slide, no.

Q. After the slide, in the afternoon of that same day,—do you know now where the snowsheds are at the bend of the flume there—the Alaska Juneau flume line? [702] A. I do.

Q. Where the flume used to be,—it has been taken away since, but where the flume used to be right under the snowsheds? A. Yes.

Q. In the afternoon of the day of the slide what, if anything, did you see in the way of water coming from that place?

A. There was quite a bit of water coming over the snowsheds.

Q. How did it look to you, that water?

Mr. RODEN.—We object to the question—it refers to matters after the slide, and considerably after the slide.

The COURT.—The object, I suppose, is simply to show that water coming over that snowshed looks like water coming out of the flume.

Mr. RODEN.—If that is the only point, all right.

Mr. HELLENTHAL.—That is the only point, your Honor.

Q. At that time, Mr. Murphy, how did that water appear to you—where did it appear to be coming from?

A. I thought it was coming from the flume.

Q. Did you see it on the next day and for several days after that in the same place?

A. Yes, I saw it for three or four days after that.

Q. How long did you continue in the belief that

(Testimony of Robert E. Murphy.)

that water was coming from the flume?

A. It was some day the next week following the slide.

Q. Then what happened?

A. Tom McDonald came in the office and asked me—

Mr. RODEN.—Wait a minute.

Mr. HELLENTHAL.—It would not be incompetent to state what Tom McDonald said.

The COURT.—Mr. Hellenthal, if that is the matter you want to develop it seems to me that you can develop it in two or three questions.

Mr. HELLENTHAL.—I have a very important matter that I want to make plain. [703]

Q. At that time, a few days after the slide, did any one direct your attention,—did you talk that matter over with anybody? A. I did.

Q. Where did that person claim the water came from?

A. He claimed it was surface water coming over the snowsheds.

Q. Then what did you do?

A. That afternoon I walked up there to see for myself.

Q. At that time did you satisfy yourself where that water came from?

A. It was all surface water coming over the snowsheds.

Q. And dropping over on to the flume and spouting out? A. Yes, sir.

Q. At that time you were of the honest opinion that that was water coming from the flume?

(Testimony of Robert E. Murphy.)

A. I was.

Q. And that is the way it appeared to you?

A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. You couldn't see the snowsheds from your office, could you? A. I could.

Q. You couldn't see the flume that was underneath them?

A. That distance is almost a quarter of a mile in a straight line from the office, and are almost directly under it—it was a very sharp angle, and it was an easy thing to confuse it.

Q. It is a quarter of a mile from your office—that is down where the Dupont office is, isn't it?

A. Dupont office, yes, sir, and I should judge it is a quarter of a mile in a straight line.

Q. This is the place, isn't it, Mr. Murphy?

A. Yes, sir; it is on the mill side—that is about the place.

Q. And your office is about here?

A. It is right straight down. [704]

Q. And you couldn't tell whether the water was coming from the snowsheds up here or whether it was coming over the flume?

A. That is the way it looked to me. I knew there was a flume there and I took it for granted it was coming from the flume.

Mr. RODEN.—Certainly you took it for granted. That is all.

(Testimony of Robert E. Murphy.)

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. How did the water come—did it flow towards you or away from you?

A. Where,—when I was standing on the street you mean?

Q. Yes, on the street.

A. It was coming right straight down towards me.

Q. A drop of about how much.

A. It was a sheet of water—I would estimate it probably 4 or 5 feet wide.

Q. How far did it drop down, Mr. Murphy, before it hit the ground,—can you tell that approximately?

A. I couldn't estimate that.

Q. It would be quite a little drop anyway?

A. There was quite a little drop there, I think.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. RODEN.)

Q. Well, you know where the penstock was located up there?

A. That was on the other side of the building?

Q. Yes. A. Yes, sir.

Q. On this map or plat, here is the penstock, here are the snowsheds, do you think you could be mistaken as to whether or not the water was coming over the snowsheds or whether it was coming out of the penstock?

A. No, sir; when I looked I didn't notice the penstock at all; [705] I saw the water coming over

(Testimony of Gudman Jensen.)

the snowshed, and I heard the flume overflowed and that is where I considered the water was coming from.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Gudman Jensen, for Defendant.

GUDMAN JENSEN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Gudman Jensen.

Q. Where do you live? A. Juneau.

Q. You have lived here a good many years?

A. Yes, sir.

Q. Do you know where the snowsheds of the Alaska Juneau Company are in Portal Gulch?

A. Yes, sir.

Q. Did you within a day or so,—you remember when this slide took place? A. Yes, sir.

Q. Within a day or so after the slide did you observe water coming over those sheds?

A. Yes, sir.

Q. Where were you standing at the time?

A. I was standing right in front of that little machine-shop just below the foundry.

Q. On Front Street? A. Yes, sir.

Q. Who was with you? [706]

A. Emil Thompson.

(Testimony of Gudman Jensen.)

Q. Is that the same Emil Thompson who is a witness in this case? A. Yes, sir.

Q. At that time did you observe any water coming over those snowsheds over the flume?

A. Yes, sir.

Q. Where did that water appear to be coming from, from where you stood?

A. Well, it come over the snowsheds as you say, and looked like there was some kind of—well, it was spreading out right on top of the flume there.

Q. How did it look to you as to what was there,—how did it look to you,—did it look to you as if there was any spout there or anything of that kind?

A. I couldn't tell exactly—it shot right out there.

Q. Did it have the appearance of overflow?

A. Over that culvert, or something of that kind.

Q. At that time where did you think the water was coming from—from the flume or elsewhere?

A. At that time?

Q. Yes, at that time?

A. Well, I didn't know—he said there was a flume overflowing.

Q. Did Thompson at that time draw your attention to this water? A. Yes.

Q. And what did he say to you at that time as to what was the water that caused the slide, if anything?

A. He said that was the water that caused the slide.

Q. He said that was the water that caused the slide? A. Yes, sir.

(Testimony of Gudman Jensen.)

Q. And he pointed to this water flowing over the snowsheds? A. Yes, sir.

Q. At that time did you have any talk with Thompson about the matter?

A. Yes; he argued that that water must have caused the slide because [707] it couldn't come down out of the gulch.

Q. It couldn't get to the slide area?

A. Couldn't get that far up.

Q. What view did Thompson express?

A. He said he was up there and saw it and that was the water that came on down over the slide.

The COURT.—Mr. Roden, if you are not going to object to this testimony I am. I cannot waste too much time on this case.

Mr. RODEN.—I have tried to object many times, but counsel always makes it a life history.

Mr. HELLENTHAL.—Your Honor did not understand my purpose in this testimony.

The COURT.—You are going into a conversation between this witness and Thompson.

Mr. HELLENTHAL.—Thompson was a witness here and testified that he saw water at that time coming from the penstock—this witness said that he saw the water coming from the snowshed—

The COURT.—If you want to impeach Mr. Thompson you should have laid the foundation.

Q. (By Mr. HELLENTHAL.) You afterwards learned where that water really came from?

A. Yes, sir.

Q. It came from the snowsheds and not from the flume? A. Yes.

(Testimony of Gudman Jensen.)

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. All that happened after the slide had happened? A. Yes, two or three days after.

Mr. RODEN.—That is all.

(Witness excused.) [708]

Testimony of W. W. Casey, for Defendant.

W. W. CASEY, a witness called on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. W. W. Casey.

Q. Where do you live? A. Juneau.

Q. You have lived in Juneau for a good many years? A. Yes, sir.

Q. Were you in Juneau at the time of the slide, on January 2, 1920? A. Yes, sir.

Q. Shortly after the slide happened did you go down to the place where it had happened?

A. Yes, sir.

Q. About how long afterwards, Mr. Casey?

A. Oh, I presume it took me ten or fifteen minutes to get down there. I was notified what it was. I heard the bell ring and I went out on the street, and a fellow came along and I said, "What's doing?" He said, "There is a slide down at Izzy Goldstein's," and I trotted down there.

(Testimony of W. W. Casey.)

Q. It was some time after the slide when you got down there? A. Yes, sir.

Q. Do you know where the Alaska Juneau penstock was, above the slide?

A. Yes, I have seen the penstock.

Q. Do you know where that horseshoe is in the draw—in Portal Gulch, where the water comes over the shed? A. I have seen that from the street.

Q. Now, Mr. Casey, after you got there what, if anything, did you see in the way of water coming from the penstock?

A. There was water running from the penstock when I arrived there.

Q. In what direction was that spouting, from where you stood? [709]

A. The penstock ran, partly at least, at right angles to me.

Q. You were looking into the thickness of the spout, or into the width of it—could you tell how wide the stream was that came from the penstock?

A. No, sir.

Q. Could you tell whether it was 2 inches, 4 inches, or 2 feet?

A. No, I couldn't testify to it—I could see some water coming out of there,—it was coming in this direction.

Q. What part of it were you looking into,—into the edge of it or into the face of it?

A. The edge of it.

Q. You couldn't see the thickness of it from where you stood? A. No, sir.

(Testimony of W. W. Casey.)

Q. How far did it fall before it hit the ground?

A. I didn't pay any attention—I suppose five or six feet—maybe eight feet—maybe four—I don't know—I couldn't say—it was something below the flume.

Q. Did you at that time see water coming from this horseshoe, at the place where the water spills over the snowshed? A. Yes, sir.

Q. How much water was coming over there—a large volume?

A. I would say five, six or seven feet wide—somewhere along there.

Q. Quite a spread of water? A. Yes, sir.

Q. How did that look, from where you stood, as to where that water came from?

A. I could see it running down there—I saw the water, but I was more interested in getting a ladder and getting some fellows that were behind the houses out.

Q. About all you remember now is that you saw the water coming over the snowshed? A. Yes.

Q. Did that come towards you or did you look into the edge of that? [710]

A. It was pretty nearly straight up from where I stood. I was in front of the slide, down below those cabins.

Q. That flowed down towards Front Street?

A. I went down towards Jim Connor's to see if I could find a ladder.

Q. It flowed towards Front Street?

A. Yes; I know going along there I seen that water.

(Testimony of Lloyd V. Winter.)

Q. But some time after the slide, that afternoon, maybe, or during that day anyway, did you observe any water coming from this chute at the place where the flume bends and goes over into Portal Gulch?

A. There was water coming down there.

Q. Did you see it on that day and the days following? A. Yes, sir.

Q. From where you were on Front Street where did that water appear to be coming from?

A. I made the remark that the flume or penstock or something up there was overflowing. [713]

Q. And that was the flow that you saw the day after the slide and for a few days after that—several days after that? A. Yes, sir.

Q. How long did you continue in the belief that that water came from the flume?

A. I think the second day I was called by Mr. Pond and we went up on the hillside to make photographs.

Q. When you went up on the hillside to make the photographs you saw it was coming from where?

A. We were making the pictures for commercial purposes and when I got up where this flume or penstock arrangement is I then saw the water was coming over the top and not over the penstock—flowing over the top.

Q. That place over there is the flume, isn't it, Mr. Winter,—the flume where you saw the water in the gulch, or the penstock, are not located there?

A. No, the penstock was this side.

Q. It wasn't at the place where the penstock really was that you saw the flow? A. No.

(Testimony of Lloyd V. Winter.)

Q. It was at a place further down channel?

A. Yes.

Q. Than where the flume comes out of the tunnel?

A. The view I had from my place I couldn't see the end. I believe there is a photograph that we took showing the overflow of the water that looked like the end of the tunnel.

Q. Did you ever see water coming from the penstock itself? A. I think not, no.

Q. Is that the picture, Mr. Winter? A. Yes.

Q. Is that the place where you saw the water running? A. Yes, sir.

Q. And that is the only place you saw it?

A. Yes. [714]

Q. That is Defendant's Exhibit No. 3. I now direct your attention to a photograph and ask you state whether you took that picture? A. Yes, sir.

Q. When did you take it?

A. On the 3d day of March.

Q. On the 3d day of March of this year?

A. Yes, sir.

Q. Where was that picture taken and what does it show?

A. It was taken on the upper part of the big slide.

Q. On the upper part of where the slide happened? A. Yes, sir.

Q. What is shown in that picture—what was the purpose of taking it?

A. Water coming from under the ground like springs.

(Testimony of Lloyd V. Winter.)

Q. Does that water show in that picture, Mr. Winter? A. Yes, sir.

Q. Can you point to the jury where it shows?

A. This water—this dark condition in here isn't the same—it is almost.

Mr. HELLENTHAL.—I will offer that picture in evidence.

Q. (By Mr. HELLENTHAL.) At that time how many springs did you find in the upper end of the slide? A. I think there were three.

Q. You think there were three? A. Yes, sir.

Q. This one is one of the largest, Mr. Winter?

A. Yes, sir.

Q. The others were smaller? A. Yes.

Q. But they were still running water? A. Yes.

Mr. RODEN.—No objection to that picture.
[715]

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 10.)

Mr. HELLENTHAL.—That is all.

Mr. RODEN.—No questions.

(Witness excused.)

Testimony of T. B. Judson, for Defendant.

T. B. JUDSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. T. B. Judson.

(Testimony of T. B. Judson.)

Q. Where do you live? A. Juneau.

Q. Where are you employed?

A. Alaska Juneau Gold Mining Company.

Q. Are you employed in the mill? A. Yes, sir.

Q. Were you employed there at the time the slide happened? A. Yes, sir.

Q. Do you remember what happened in the mill shortly after eleven o'clock of that forenoon with reference to power conditions? A. Yes, sir.

Q. What happened? A. The power kicked out.

Q. When the power kicked out what went out first? A. Some of the ball mills.

Q. The motors went out? A. Yes, sir.

Q. Did the lights go out at the same time the motors went out?

A. No, sir; they were lit a short time after that.
[716]

Q. They were burning for a short time after that and then they went out, is that right?

A. Yes, sir.

Q. Now, Mr. Judson, do you know where this crack is appearing below the City dock in the hillside?

A. Yes, sir; I think I discovered it.

Q. When did you discover it?

A. It was the day the "Alameda" went west—I think it was last Monday.

Q. At that time how wide was it?

Mr. RODEN.—We object to anything that he discovered last Monday—that has no bearing upon this case at all—it opens up a whole new field.

Mr. HELLENTHAL.—I want to ask one or two

(Testimony of T. B. Judson.)

questions, to show the progressive movement of the earth bodies—that is all I want to ask him—that and how wide it was on a subsequent date—that is all.

The COURT.—Very well, you may ask him that question.

Q. How wide was it, Mr. Judson, at the time when you first saw it?

A. At that time it was very narrow. I didn't tell anybody anything about it because I didn't think it was anything very serious.

Q. When did you see it next?

A. I think it was night before last, Mr. Clauson and I were talking.

Q. What did you see night before last?

A. He and I went there and looked at it.

Q. Was it wider?

A. Yes, sir; it was 2 feet wide in some places—we traced it.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. That crack you saw up there last night, that is in a great big waste pile?

A. I don't think so. [717]

Q. Can't you see it now—here is the waste pile and here is the crack?

A. I didn't look at it that far over.

Q. You didn't go close to the waste pile, did you?

A. I traced it over as far as the creek and it seemed to turn down the hill.

(Testimony of T. B. Judson.)

Q. The crack is running right into the edge now, isn't it, of that waste pile?

A. I haven't been over there since night before last.

Q. It was running there then, wasn't it?

A. It wasn't running in it then, I don't think, at that time—not to my observation.

Q. This is the waste pile—how close to the waste pile did you see this crack?

A. Right to the side of the creek.

Q. How close to the waste pile?

A. I think the creek describes the waste pile; at that point, where the crack is I think it is 15 to 20 feet from the waste pile, or more.

Q. You don't know now whether the crack runs into the waste pile or not? A. I do not.

Q. And you didn't notice any water coming down this hill and running into the crack and under the waste pile?

A. I think the water stays on top of the ground—it did when I looked at it.

Q. And then the crack extends along the hill for some distance, doesn't it? A. Yes.

Q. Then what does it do?

A. I haven't traced it out—I just called the attention of Mr. Clauson to it.

Q. You didn't trace it out at all?

A. It isn't my business to trace it out—I just pointed it out. [718]

Q. Is it very easily seen?

A. When I discovered it it was right near the

(Testimony of T. B. Judson.)

Gastineau pole—I saw where the rocks had run over from the Gastineau pole—and I thought the rocks were settling at that time.

Q. Doesn't the crack run straight down the hill towards the waterfront?

A. I didn't trace it down. I took Mr. Clauson over there and showed it to him, and he went, I think, to Mr. Hargraves about it—that is his part of the work.

Q. Doesn't it appear to you that the weight of this rock pile is the very cause of smashing this ground down—weighing it down?

A. I haven't given it any thought.

Q. You cannot figure out any crack coming down this way, can you?

A. Yes; the whole hill couldn't break without a crack somewhere.

Q. Wouldn't it crack along the plane of the hill—practically parallel with the hill?

A. It would have to break down somewhere.

Q. In other words if you look at this diagram here, you have got a mountain-side here—here is the mountain-side—now this crack runs this way, and here is the waste pile—how do you explain this crack running up and down the hill?

A. I don't get you with reference to where I saw the crack. It started by the corner of that chicken fence and went over towards the waste pile—as far as the extent of the crack now, I would have to look at it and go over it, I guess.

Q. As a matter of fact, you haven't examined

(Testimony of John H. King.)

that crack down there very carefully, have you?

A. No, sir; I just reported it to Mr. Clauson.

Mr. RODEN.—That is all.

(Witness excused.) [719]

Testimony of John H. King, for Defendant.

JOHN H. KING, called as a witness for the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is John H. King? A. Yes, sir.

Q. Were you working in the Alaska Juneau mill at the time the slide occurred on January 2, 1920?

A. Yes, sir.

Q. Shortly after eleven o'clock what, if anything, happened in the mill to the power?

A. The machinery all stopped.

Q. Did the lights go out at the same time that the machinery stopped? A. No, sir.

Q. The lights stayed on? A. Yes, sir.

Q. How long after the machinery stopped did the lights go out?

A. Just about that—I couldn't tell but I should judge it would be at least 5 minutes.

Q. Some short period like that—5 or 10 minutes would you say? A. Yes, sir.

Q. Then the lights also went out? A. Yes, sir.

Q. And everything went out? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

(Testimony of John H. King.)

Cross-examination.

(By Mr. RODEN.)

Q. The whole plant went out of commission, is that the idea?

A. I presume it did. You see I was way on the bottom floor and the machinery in my room stopped, and I presume the machinery [720] everywhere else stopped, because when I came out everything was dead.

Q. Everything was dead? A. Yes, sir.

Q. From the crushers to the retreating plant?

A. Yes, sir.

Q. How long did that continue?

A. That it was shut down?

Q. Yes.

A. I think it was somewhere along about half-past one or two o'clock in the afternoon—I believe so—when we started up,—I ain't sure of it, though.

Q. It continued for an hour or so, anyhow?

A. Yes, sir.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Ed. Crowell, for Defendant.

ED. CROWELL, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Ed. Crowell.

(Testimony of Ed Crowell.)

Q. At the time this slide occurred on January 2, 1920, where were you working?

A. At the stamp mill.

Q. You were working in the stamp mill?

A. Yes, sir.

Q. For the Alaska Juneau Company?

A. Yes, sir.

Q. The stamp mill is the small mill this side of the big ball [721] mill, isn't it? A. Yes, sir.

Q. That is the mill you were in? A. Yes, sir.

Q. You were not in the new mill—the big mill?

A. No.

Q. But in the stamp mill? A. Yes.

Q. The 50-stamp mill marked on the plat?

A. Yes.

Q. Do you remember what happened shortly after 11 o'clock in the stamp mill with reference to the power?

A. The power went off and everything shut down.

Q. Did the lights go out at the same time the power went off?

A. Yes, the lights went out at the same time the power went off.

Q. The power went off and the lights went out all at the same time? A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Mr. RODEN.—No questions.

(Witness excused.) [722]

Testimony of James E. Higgins, for Defendant.

JAMES E. HIGGINS, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. James E. Higgins.

Q. Where do you live, Mr. Higgins?

A. Juneau.

Q. What is your profession? A. Electrician.

Q. Where are you employed?

A. By the Alaska Juneau Gold Mining Company.

Q. What position do you hold with them?

A. Chief electrician.

Q. Did you occupy that position at the time the slide occurred on January 2d, 1920? A. I did.

Q. And for some time prior to that time?

A. Yes, sir.

Q. Are you familiar with the trommel screen, a model of which has been introduced in evidence here? A. Yes, sir.

Q. Do you remember the occasion of its installation? A. Yes, sir.

Q. About how long ago was it when that screen was installed? A. It was installed in April, 1918.

Q. At that time did you install a motor to drive it? A. Yes, sir.

Q. What size motor did you install?

(Testimony of James E. Higgins.)

A. Three horse-power motor.

Q. What kind of a motor was it?

A. A 3 phase motor running on a single phase circuit. [723]

Q. Before I proceed on that investigation I want to ask you a question or two about the power conditions. Where does the Alaska Juneau get its power from?

A. From the Sheep Creek power plant located below Thane a little bit; from the Nugget Creek power plant located at the Mendenhall Glacier; from the 240 generating station over at Treadwell, and get some power from the Gastineau Mining Company; we also have a steam plant down here at the Alaska Juneau.

Q. Now, the power that comes from these various generating plants, where, if at all, is that concentrated?

A. The feeders all come into the bust bars down at the power plant.

Q. All this power from the various sources comes on to the bust bars at the power plant, is that right?

A. We are connected up with all these different power plants so we can use all the power we require.

Q. And that power is brought down to the bust bars of the Alaska Juneau in one place?

A. Yes, sir.

Q. I wish you would explain what is meant by the bust bars.

(Testimony of James E. Higgins.)

The COURT.—Aren't you going into a good deal of unnecessary detail?

Mr. HELLENTHAL.—Not any more than is just necessary to get the idea before the jury. I want the jury to know how these electrical connections are made so that they will understand the effect of the slide upon them.

The COURT.—Your whole object, of course,—I know from the other case,—is to show how an interruption in one part of the power interrupts another part and how one is dependent upon the other. The fact that the motor stopped, what would that indicate,—you can just ask those questions and let Mr. Roden bring out all the rest on cross-examination.

Mr. HELLENTHAL.—I know, but I can do it in 1/10th of the time [724] that he can on cross-examination, and to my mind it ought to be made clear to the jury, and I want the jury to know.

The COURT.—You want them to know the ultimate fact?

Mr. HELLENTHAL.—I want them to know enough detail so that they can see the ultimate fact, that is all.

Q. (By Mr. HELLENTHAL.) Anyhow, the power comes in on the bust bars? A. Yes, sir.

Q. And they are situated in the Alaska Juneau power plant? A. Yes, sir.

Q. How does the power get from there, from the bust bars, to the various places of use?

A. It is tapped off the bust bars at intervals

(Testimony of James E. Higgins.)

upon the switch board, connected to the different feeders that feed the different units of the mill.

Q. There are a number of feeders or circuits—there are several circuits, are there not?

A. Yes, sir.

Q. And they start from the bust bars and go to the mill to supply current to various machines in the mill? A. Yes, sir.

Q. How many of these feeders were there approximately?

A. There are seven running up to the mill.

Q. And there is also one running up the hill—the direct current, isn't there? A. Yes, sir.

Q. That would be eight in all?

A. That would be eight.

Q. Now, on which one of those feeders is the trommel screen motor?

A. That was connected to No. 15 feeder.

Q. On what feeder are the lights in the tunnel at the point where the two tunnels meet, marked "Lights" on Exhibit No. 2?

A. That is connected to No. 15 feeder also.

Q. The same feeder? A. Yes, sir. [725]

Q. On what feeder is the stamp mill?

A. That is connected to No. 15 feeder.

Q. That same feeder supplies the stamp mill, the trommel screen motor and the lights in the tunnel?

A. Yes, sir.

Q. Now, your motors, have they any protection in the way of fuses or circuit-breakers?

A. On the small load voltage motors we have

(Testimony of James E. Higgins.)

them protected by cartage fuses.

Q. How do you protect the large motors?

A. The larger higher voltage motors in the mill are protected by instantaneous circuit-breakers.

Q. Those are a mechanical device intended for large motors? A. Yes, sir.

Q. And the other device operates practically the same way for small motors?

A. They operate to the same point only they are not so elaborate an installation.

Q. Now, in the event that a short circuit comes over the line it is liable to kick out any of these circuit-breakers and stop the motors, is that right?

A. Yes, sir.

Q. Now, at the power plant where these feeders leave the bust bars, what have you there?

A. We have what is known as a time limit relay that is designed to carry a certain per cent overload for a certain length of time. The idea of that is to enable us to start motors up in the mill without kicking out the circuit. When we have other motors running on the same circuit we can shut down one motor and start up another without running so much chance of kicking out the power in the power-house and kicking out the motors on that circuit.

Q. And each circuit is connected with one of these circuit-breakers? A. Yes, sir. [726]

Q. No. 15 circuit along with the others?

A. Yes, sir.

Q. If No. 15 circuit should kick out at any time

(Testimony of James E. Higgins.)

what would be the effect on the motor at the trommel screen,—that is to say, if that time relay circuit-breaker situated in the power-house should go out, how would that effect the motor at the trommel screen?

A. That would stop it—have no power to run it.

Q. How would that affect the lights in the tunnel at the point marked “lights” on the map?

A. They would go out.

Q. How would it affect the stamp mill?

A. That would stop also.

Q. Everything in the stamp mill would stop?

A. Yes, sir.

Q. Including the lights? A. Yes, sir.

Q. The lights would go off? A. Yes, sir.

Q. And everything on that circuit would be dead?

A. Yes, sir.

Q. Out of commission. All right. Now, in the ball mill could the motors kick out and leave the lights on? A. Yes.

Q. If a short circuit came in it might kick out the motors and leave the lights burning? A. Yes.

Q. What would that indicate with reference to that circuit?

A. It would indicate that there was a disturbance on that circuit sufficient to kick the motors out but not sufficient to kick the time relays out in the power-house.

Q. It would indicate that there would still be power on that circuit? A. Yes. [727]

(Testimony of James E. Higgins.)

Q. If the lights were on, but if the lights were off what would it indicate?

A. It would indicate that that circuit was out.

Q. It would indicate that that circuit was out along with the rest of them? A. Yes, sir.

Q. There might be power on the circuit and yet be no power on No. 15; is that right? A. Yes.

Q. If the circuit-breaker on No. 15 should kick out and the circuit-breaker on No. 17—that is No. 17 that supplies the mill, isn't it?

A. 17 supplies the mill lights.

Q. And if 17 remained in the lights in the big mill would remain on after the circuit-breaker on No. 15 was kicked out? A. Yes, sir.

Q. Where does the train get its power from?

A. The train gets its power from a rotary converter. There is one of them located in the power plant and one of them located in the Jualpa sub-station.

Q. Those rotary converters are on a circuit by themselves? A. Yes, sir.

Q. What is the number of that circuit?

A. We call it the rotary converter circuit.

Q. And that converter is to convert the alternating current to a direct current? A. Yes, sir.

Q. If No. 17 kicked out and the rotary converter circuit remained in they would still have power on the train long after the trommel screen had kicked out? A. Yes.

Q. The trommel screen would be stopped and the

(Testimony of James E. Higgins.)

lights would go out and there would still be power to run the train? A. Yes. [728]

Q. Now, at the time you installed this 3 horse-power motor, I wish you would explain to the jury in a brief way—not in detail, but explain in a general way, what kind of a motor it was.

A. It was a 3 horse-power 220 volt 3 phase motor.

Q. What is a 3 phase motor—what is a 3 phase circuit,—you have a 3 phase system, haven't you?

A. Yes, sir.

Q. What is a 3 phase system?

A. Well, it consists of 3 phases on a generator. They are so connected that when the generator is operating under normal conditions you have three phases. They have single phase generators, and two phase generators,—we have a 3 phase system here.

Q. Carry the juice on three wires, don't you?

A. Yes, sir.

Q. Your 3 phase system carries juice on three wires from the generator? A. Yes, sir.

Q. That 3 horse-power motor that you installed was a single phase motor?

A. It was a 3 phase motor running on a single phase circuit.

Q. It was a motor that did not fit conditions?

A. No, sir.

Q. What kind of a motor was indicated at the time you installed the motor at the trommel screen?

A. I never saw the blue-prints of that and I don't know what motor was indicated on them.

(Testimony of James E. Higgins.)

Q. You know what kind of a motor that you tried to get?

A. We didn't have any smaller motor so we had to put that larger motor on.

Q. Did the trommel screen require a motor of that size?

A. No, the construction foreman told me—

Mr. RODEN.—Never mind what the construction foreman told you. [729]

Q. What was the motor required?

A. That trommel screen would not have required over one horse-power to operate it.

Q. Did you have a one or two horse-power motor in stock? A. No, sir.

A. That was during the war? A. Yes, sir.

Q. Could you get one at that time?

Mr. RODEN.—We object to the question. The question is what did he install, not what he might have installed.

The COURT.—Yes, I think so.

Mr. HELLENTHAL.—If counsel will leave me alone I will get through with this thing in very short order.

Mr. RODEN.—Yes, but we don't want it in,—maybe you do, but we don't want it in. Of course you will get it in.

Q. You installed a 3 horse-power motor. Why did you install a 3 horse-power motor, Mr. Higgins?

A. Because that was the only motor we had at that time.

Q. What, if anything, did you go to get the right

(Testimony of James E. Higgins.)

size motor or the right type of motor?

A. We ordered a smaller motor.

Q. Did you get it right away? A. No.

Q. How long afterwards did you get it?

A. A little less than a year,—about 8 or 9 months, I think.

Q. Could *be* motors be had at that time in any less time?

A. We had trouble even getting our electrical supplies at that time.

Q. That was during the war period?

A. Yes, sir.

Q. Now, Mr. Higgins, while that 3 horse-power motor was in there, that single phase system motor, did you have any trouble with the trommel screen?
[730]

A. Yes, we had trouble that I recollect on two different occasions.

Q. What happened on those occasions?

A. Well, we had disturbances on the power system and the motor stopped, due to the low voltage caused by the disturbances on the system, and it wouldn't start up again, and it was quite a little while before we got up there to look at the motor; and once the motor was setting on the line and burned up.

Q. Burned up and fixed again? A. Yes, sir.

Q. Did the trommel screen stop on those occasions? A. Yes, sir.

Q. Did the water run over?

A. Yes, it ran over once that I know of.

(Testimony of James E. Higgins.)

Q. The other times the water ran through the screen even though it stood still? A. Yes.

Q. Did you afterwards get a 2 horse-power motor? A. Yes.

Q. That was a 3 phase motor such as the system required? A. Yes.

Q. What did you do in the way of installing that?

A. We installed it as soon as we got it.

Q. How long before the slide was that?

A. Well, we installed that motor along in January of 1919.

Q. Now, after that did you have any trouble with the motor?

A. Yes, we had—we had trouble with the motor on a couple of occasions.

Q. I wish you would tell the jury what those occasions were and how it happened.

A. They were power disturbances similar to the ones we had before. The voltage dropped and went clear off and the power came back on again and the fuses we had on the motor were so [731] large that they didn't blow—one of the fuses blew on one occasion and left the motor running single phase, and it got pretty warm—in fact got so warm that the insulation ran from the windings on to the rotar and stopped it, and we had to take it out and repair it.

Q. You had the fuse too heavy at that time?

A. Yes, sir.

Q. Did the trommel screen stop at that time?

(Testimony of James E. Higgins.)

A. Yes.

Q. Did it overflow? A. Yes.

Q. How long was it until you got it fixed? You got it fixed, did you?

A. Yes; I put some boards in the bottom of the screen to hold the water in there.

Q. I wish you would tell that whole circumstance—what happened when the thing first burned out?

The COURT.—Mr. Hellenthal, what bearing has this on the question as to whether or not the slide was caused by the negligence of the Company?

Mr. HELLENTHAL.—Why, your Honor, it shows exactly how the water did come out of the screen when it overflowed, and shows why the water did not come when it is claimed to have come. It is the whole case—it is the crux of our case,—more important than any evidence we have had—more material—has more bearing and is more important than anything else.

The COURT.—This case has got to end to-morrow.

Mr. HELLENTHAL.—All right; I am going to put my case in.

Q. Mr. Higgins, explain to the jury how did that motor stop that time,—you have already said that it blew out a fuse? A. Yes.

Q. Did you go up there afterwards? A. Yes.

Q. At that time when you first went up there, was the water [732] running over the screen or through it?

A. It was running through the screen.

(Testimony of James E. Higgins.)

Q. It was not running over it? A. No, sir.

Q. It had been standing still about how long?

A. Possibly half an hour to 45 minutes.

Q. There was no water running over the screen?

A. No.

Q. How long did you stay there at that time?

A. I just stayed there long enough to look over the motor and put some boards in the bottom of the screen there so that if the screen did fill up with debris and start to spill over these boards would prevent it from spilling over.

Q. You had to take the motor out to have it fixed? A. Yes, sir.

Q. And that is the way you fixed the screen temporarily? A. Yes.

Q. When you went back there what did you find?

A. We went back there the next morning and the screen had been running over.

Q. What did you do?

A. We cut a hole in the screen to let the water run through and not screen it.

Q. Did you find at that time what caused the screen to run over?

A. Yes; it got filled up with an excessive amount of moss and debris.

Q. Did you find out where that moss and debris came from?

A. Yes; from some placer mining operations further up the creek.

Q. It came from some placer mining operations up in Gold Creek that you didn't know about the

(Testimony of James E. Higgins.)

day before, is that right? A. Yes.

Q. After that did you have any trouble with the screen?

A. We had trouble on one occasion after that, due to the electrician down at the stamp-mill pulling out a switch and [733] stopping the motor through negligence.

Q. That was another time the screen stopped?

A. Yes.

Q. Did it overflow at that time?

A. Yes, it overflowed at that time.

Q. Did you notice where the water flowed to?

A. No, sir, I didn't trace it at all—it happened at night.

Q. That screen was immediately started again?

A. Yes, sir.

Q. From that time on to the time of the slide did you have any trouble? A. No.

Q. When was the last time that you had any trouble with it?

A. That last time was in July or August, 1919.

Q. Since you put in the new motor, the two horse-power 3 phase circuit motor, did you have any trouble with the motor that was the fault of the motor itself? A. No, sir.

Q. Did you have any trouble with anything except outside disturbances that you have explained?

A. No, sir.

Q. Now, when you found that that motor had been overfused and burned out on the first occasion, what size fuse did you put in there?

(Testimony of James E. Higgins.)

A. Put 5 ampere fuses on it.

Q. What size fuses did you have in the motor at the time of the slide?

A. We had 5 ampere fuses.

Q. And that was the fuse that you had in all the time? A. Yes, sir.

Q. That 5 ampere fuse, how much overloaded was that, if any?

A. That would allow a 2 horse-power motor about 50 or 60 per cent overload. [734]

Q. And if the screen only required 1 horse-power it would be how much overload as a matter of fact?

A. It would be over 100 per cent overload.

Q. How much overload did you have in your circuit-breakers in the mill?

A. We have them set for,—must be about 20 to 25 per cent overload.

Q. You have them set for 120 to 125 per cent load?

A. I should think set at 20 to 25 per cent overload.

Q. So this circuit-breaker at the trommel screen was set over a hundred per cent while the other motors were set at 20 to 25 per cent? A. Yes.

Q. Now, would an instantaneous short circuit coming over the line have any effect on the motor at the trommel screen?

A. No,—that is the reason we had it so heavily overfused.

Q. It acted in the same manner as the time relay circuit-breaker, that is, an overload circuit-breaker?

(Testimony of James E. Higgins.)

A. It worked to that object, yes.

Q. So that it couldn't go out with a short circuit? A. No.

Q. Now, on the day of the slide did you have any electrical disturbances on your system—the morning of the slide? A. Yes.

Q. When.

A. We had some in the morning between 9 and 10 o'clock.

Q. Have you got a recording volt meter at your power plant?

A. Yes; we have them at all power plants.

Q. Have you a volt meter that automatically shows what your disturbances were on that morning? A. Yes.

Q. I hand you here a chart and ask you to tell the jury what that is.

A. This is a voltage chart that we had on a volt meter in the [735] power plant on January 2, 1920.

Q. That shows every disturbance that occurred that day? A. Yes, sir.

Mr. HELLENTHAL.—I offer that in evidence.

Mr. RODEN.—No objection.

(Whereupon said voltage chart was received in evidence and marked Defendant's Exhibit No. 11.)

Q. Now, you have an appliance that automatically indicates upon this chart that I now hold in my hand, Exhibit No. 11, the condition of the voltage at any given time?

A. Yes; it is recorded by means of clock move-

(Testimony of James E. Higgins.)

ment so it records the time very nearly—within a few minutes of the time it happens.

Q. And there is a needle that is fed with red ink that traces the disturbances upon the chart?

A. Yes, sir.

Q. Look at that and tell the jury what happened in the way of electrical disturbances between 9 o'clock and 10 o'clock the morning of the slide.

A. There was one disturbance about 9:30—or 9:25 I should say.

Q. 9:25 is the first one?

A. Yes; the second one was about 9:35, and the third one about 9:45.

Q. Those were disturbances between 9 and 10 o'clock? A. Yes.

Q. Do you know of your own knowledge of those disturbances to the system besides what is shown on the chart?

A. About 9:45, the last disturbance, there was some trouble showed up in the compressor plant up at the Jualpa plant substation.

Q. Did any of the motors go out in the forenoon while those disturbances happened, in the mill or elsewhere? A. Not that I know of.

Q. You don't know anything about that? [736]

A. No.

Q. You simply watched the power plant?

A. Yes.

Q. Did you inquire to find out where those disturbances came from? A. Yes.

Q. Did you make inquiry along the circuits of

(Testimony of James E. Higgins.)

the different lines you have? A. Yes.

Q. Could you find any cause for those disturbances? A. No.

Q. The trouble that showed up at the substation in the Basin was such as could be caused by a disturbance that occurred elsewhere? A. Yes.

Q. Now, do you know where the wires of the Alaska Gastineau and those of the Alaska Juneau cross? A. Yes, sir.

Q. Where is that?

A. Down there on the other side of the administration building.

Q. Where is it with reference to the slide?

A. Well, it is towards the power plant from the slide.

Q. How do those wires run there—how do they cross,—which is above and which is below?

A. The Alaska Gastineau wires are above the Alaska Juneau wires.

Q. About how far above? A. About 8 feet.

Q. That is only an approximate distance?

A. Yes.

Q. You would not be sure as to the exact distance? A. No.

Q. How wide is the span of the Alaska Gastineau at that point? A. About 300 feet.

Q. And where with reference to the ends of the span did the wires cross? [737]

A. Along about the middle.

Q. So that the point where the wires cross is where the sag is the greatest? A. Yes.

(Testimony of James E. Higgins.)

Q. Do you know where the tower of the Gas-
ineau Company stood in the slide area?

A. Yes, I know approximately where it stood.

Q. You know there was a tower in the slide area?

A. Yes.

Q. Now, you know how those wires are fastened
to the poles? A. Yes, sir.

Q. How are they fastened—are they slipped
through or stationary?

A. They are slipped through the tie wires.

Q. Now, if a pole in the slide area should be
moved by sudden jerks of the ground in which it
stood, what effect would that have upon the wires
at the point where they crossed?

A. That would allow the wires to sag more or
less at the point where they cross, and if they sagged
enough they would come in contact with the other
wires below them.

Q. There is only one pole between the slide and
the place where they crossed? A. Yes.

Q. Now, if those wires should come in contact
there what effect would that have upon the system?

A. It would cause a short circuit or show a dis-
turbance in the power system similar to what this
chart shows.

Q. Create a condition similar to what the chart
shows? A. Yes.

Q. Did you find upon your inquiry any other
cause that might have caused these three short cir-
cuits except the fact that those wires came together
at that point? A. No, sir.

(Testimony of James E. Higgins.)

Q. That was the only one. Now, at about 11 o'clock, or shortly before 11, that shows also a short circuit,—or shortly [738] after 11 there is a short circuit registered there, is there not?

A. Yes.

Q. The voltage did not seem to drop as low as it did on the previous occasions? A. No.

Q. If three short circuits—if those wires should come together three times in succession, about as I have indicated, how would that show upon the chart?

A. It would show one line—it would be so close together there the ink would blur together and look like one line.

Q. Show as it does show upon the chart?

A. Yes.

Q. What effect would those three short circuits, coming in quick succession, have upon the circuit-breaker as compared to the effect that one short circuit would have, coming instantaneously?

A. It would have more the effect of kicking the circuit-breakers out.

Q. It would have more the effect of kicking the circuit-breakers out even though the voltage did not drop so low? A. Yes, sir.

Q. The voltage might drop very low and come back without kicking out the circuit-breaker, whereas three short circuits coming in succession that way might kick the circuit-breaker out, is that right?

A. On an instantaneous short the voltage might

(Testimony of James E. Higgins.)

drop quite low and the motors would not have time to retard the rotation sufficiently to kick them out before the voltage came back up again; but if three shorts came in as you indicated there, it would give the motors more of a chance to retard, and when the voltage finally came up again it would cause them to kick out.

Q. What does the chart show with reference to another short circuit after that—one after 11 o'clock? [739]

A. It shows one there at about 11:15 on this chart.

Q. To what extent did that short circuit go—was that continuous or otherwise?

A. It was continuous—it shows that the voltage went clear down.

Q. That everything stopped? A. Yes.

Q. Shows there was no power on the line at all?

A. No.

Q. For how long a time?

A. Well, it would be about—oh, approximately 3 minutes on this chart.

Q. What is the length of time as shown on the chart between the time the three short circuits I have referred to came in and the time that all the power went off,—approximately—you cannot tell to the minute, can you?

A. Four or five minutes—six minutes.

Q. Anywhere along there?

A. I couldn't tell exactly.

Q. Might have been a little longer?

(Testimony of James E. Higgins.)

A. It might have been longer.

Q. Might have been anywhere from 8 to 9 or 10 minutes, might it not, Mr. Higgins?

A. I would say 5 to 6 minutes.

Q. Anyway, a short time—along about that?

A. Yes.

Q. Now, Mr. Higgins, I think you have already explained that if feeder No. 15, or No. 15 circuit, kicked out the trommel screen and the lights and the stamp-mill would all go out at the same time?

A. Yes.

Q. Could the trommel screen have power if the lights were out? A. No.

Q. If the lights were out that is a certain indication that everything on that circuit was dead?

A. Yes. [740]

Q. Could there be lights if there was no power on the circuit?

A. No, if there was no power on the circuit the lights would be out.

Q. And if the lights were out that would indicate for a certainty that there was no power on the circuit? A. Yes.

Q. All right. If any one was at that place marked "lights" and found the lights out he was there after the power had gone off the circuit?

A. Yes.

Q. Now, Mr. Higgins, that morning shortly after 11 o'clock, prior to the time that these disturbances occurred—just prior to that time—were you at the power-house?

(Testimony of James E. Higgins.)

A. You mean the last disturbance?

Q. Yes.

A. Yes, I was there,—I left the power-house about 11 o'clock.

Q. Some time after 11 o'clock?

A. Nearly 11 o'clock,—very close to 11 o'clock that I left.

Q. You could not state the exact time? A. No.

Q. It might have been a little later?

A. Yes, it might have been a little later.

Q. Where did you go?

A. I went up Front Street to Marshall and Newman's.

Q. Now, when you left,—before you left at that time, at 11 o'clock, or shortly after, were all the circuits in? A. Yes.

Q. Every feeder was in? A. Yes.

Q. Was No. 15 feeder, on which the trommel screen was situated, in at that time?

A. Yes, sir.

Q. Every feeder in the power-house was in?

A. Yes, sir. [741]

Q. Where did you go to?

A. I went up to Marshall & Newman's plumbing-shop.

Q. You followed up Front Street to Marshall and Newman's plumbing-shop? A. Yes, sir.

Q. You took the route that I am pointing to on the map,—you left the power-house at the point marked "power-house" on the map and followed

(Testimony of James E. Higgins.)

Front Street along towards Marshall and Newman's? A. Yes.

Q. Is that right? A. Yes.

Q. Now, did you see any flashes on your route to Marshall and Newman's? A. No.

Q. Now, if those three short flashes had occurred between the time that you left the power-house and the time that you got to the place marked "Sawmill boarding-house" there, would you have seen them? A. No, I wouldn't have seen them.

Q. Explain to the jury why.

A. Well, you are down behind the hill there, and there is buildings all the way up on that street there, so it would shut off the view or reflection of any flashes that would occur any place along the line.

Q. And you didn't see them? A. No, sir.

Q. Now, from the time that you left the sawmill boarding-house up to Marshall and Newman's if flashes had occurred would you have seen them?

A. Yes, I would have seen the reflections there.

Q. You would have seen the reflections there?

A. Yes, sir. [742]

Q. Could such reflections have occurred without your noticing them at that time? A. No.

Q. Being in that business you would have been bound to have seen them? A. Yes.

Q. When you got to a point opposite the foundry did you look up the hill? A. Yes.

Q. Did you observe the trommel screen?

A. I did.

Q. What, if anything, did you observe at the trommel screen?

(Testimony of James E. Higgins.)

A. Water was running over the spillway.

Q. I want you to describe to the jury in what direction that water was spouting.

A. It was spouting right out of the spillway.

Q. In what direction,—which direction was the spout headed?

A. The spout was headed almost parallel with the mountain there.

Q. The spout was headed almost parallel with the mountain and almost parallel with Front Street?

A. Yes.

Q. As you looked up at it could you tell how wide the stream was? A. No, not very well.

Q. Tell the jury just how the stream looked, as quickly as possible, so we will get through.

A. It looked like a stream maybe as big around as that pitcher sitting on the desk there.

Q. Looked like a round stream? A. Yes.

Q. Could you see the face of it at all?

A. No, I couldn't see the face of it. I was looking kind of under it.

Q. Under it, into the edge of it?

A. Yes. [743]

Q. Into the edge of it and under it to some extent? A. Yes, sir.

Q. It was to some extent going from you?

A. Yes.

Q. And you saw the edge of the bow as it squirted out? A. Yes, sir.

Q. And slightly under it? A. Yes, sir.

Q. How far did it drop before it hit the ground—approximately, I mean?

(Testimony of James E. Higgins.)

A. From 6 to 8 feet—I couldn't say exactly.

Q. Now, at that time did you observe any water coming over the snowsheds at Portal Gulch?

A. Yes.

Q. How much water was coming over there?

A. There was quite a bit of water running over there.

Q. How was that coming over?

A. It was running over the snowsheds and falling down onto that roof of the flume.

Q. Where did it appear to you, as you saw it from the street, to be coming from—where did it shoot out from?

A. It spilled right off of that roof of the flume there—that is the most visible part of it.

Q. The most visible part is where it shot off the flume? A. Yes.

Q. In what direction did that shoot?

A. Straight down towards the street.

Q. Could you tell the width of that,—was the width of it visible, that is what I mean?

A. No; it looked like a wide stream where it spreads out there on the roof of that flume—I couldn't tell how wide it is.

Q. I am not asking you to tell how wide it was,—I say could you see the face of it from where you stood? A. Yes, sir. [744]

Q. Could you see the thickness of it? A. No.

Q. How far did that drop before it hit the ground?

A. Around 20 or 30 feet—I couldn't say exactly—I never measured that there.

(Testimony of James E. Higgins.)

Q. To one standing where you stood, not knowing the conditions as you knew them, how would that stream appear as to where the water would seem to be coming from?

A. The first impression would be that it come from that flume.

Q. It would require a critical examination to see that it did not come from the flume? A. Yes.

Q. At that distance? A. Yes.

Q. After you saw this water coming out of the spout of the trommel screen what did you do?

A. I immediately hurried up to Marshall and Newman's and telephoned down to the power plant to a man there to go immediately to the mill and get Nordling and tell him to go to the trommel screen and find out what the trouble was.

Q. Who answered the phone?

A. A man by the name of Summers.

Q. And you directed him to go immediately and find Nordling where? A. In the mill.

Q. And you told him to tell Nordling to go to the trommel screen? A. Yes.

Q. You were in Marshall and Newman's?

A. Yes.

Q. That was immediately after you saw the water spouting out?

A. It would be probably three minutes.

Q. It was the exact length of time it would take you to go from the place where you saw it to Marshall and Newman's? A. Yes, sir.

Q. And you immediately went in and telephoned,

(Testimony of James E. Higgins.)

is that right? [745] A. Yes, sir.

Q. How far was it from the place where you saw the water spout out up to Marshall and Newman's?

A. Well, it is about 3 blocks or four blocks up to Marshall and Newman's.

Q. It isn't that far, Mr. Higgins, is it—you went to Marshall and Newman's store on Front Street, didn't you? A. Yes, sir.

Q. The foundry was on Front Street, wasn't it?

A. Yes.

Q. Well, I guess the jurymen know where it is, anyhow. You went into Marshall and Newman's and telephoned at once, is that right?

A. Yes, sir.

Q. After you were in Marshall and Newman's what happened?

A. The phone rang, and the clerk was busy arguing with Henry La France about a bill and so I answered the phone and Mrs. Marshall was on the phone and wanted to know where the fire was.

Q. Had you heard the fire-bell ring? A. No.

Q. Then you talked to Mrs. Marshall a minute?

A. Yes.

Q. Then what did you do?

A. I stepped outside to see if I could see any fire,—she said they gave the alarm for that section of town.

Q. Did you see anything?

A. I saw the fire engine standing there.

Q. That would be a minute or three or four minutes after you phoned in the first place? A. Yes.

(Testimony of James E. Higgins.)

Q. After you telephoned to Nordling, I mean?

A. Yes, sir.

Q. Did you immediately go out of the store or did you remain there for a while? [746]

A. No, I stayed in the store until I finished up my business.

Q. How long were you in there, probably?

A. I was in there a matter of probably ten minutes.

Q. Did you know what happened in the meantime? A. No.

Q. Then where did you go?

A. I went out on the street, saw the effects of this slide, saw the people down there, and I went on down the street and looked at it, and went right down to the Alaska Juneau.

Q. As you stood there looking at the slide was the water already coming over the apex of it, the top of it?

A. There was a little water coming over there—probably 5 or 10 gallons a minute.

Q. You saw the water coming over the top of the slide at that time? A. Yes, sir.

Q. Then where did you go?

A. Went right down to the Alaska Juneau.

Q. Whom, if anyone, did you meet on your way?

A. I met John Richards.

Q. Where did you meet him?

A. Right opposite the sawmill boarding-house.

Q. Jack Richards, the superintendent of the mine? A. Yes, sir.

(Testimony of James E. Higgins.)

Q. What did you tell him?

A. I told him about the trommel screen running over,—I told him about the slide and about the water coming over the slide.

Q. Where did you go?

A. I went on down to the Alaska Juneau—I went to the power-house and he went to the office.

Q. After you got into the power-house did you see Wert Newman? A. Yes, sir.

Q. Where did you and Wert Newman go from there?

A. I stayed around the power-house for a little while. [747]

Q. How much do you mean by that—a minute or five minutes?

A. I was probably there 5 to 8 minutes.

Q. Then where did you go?

A. Newman and I went up Ewing Street up to the slide area, over on Gastineau Avenue and then on up to the trommel screen.

Q. You didn't examine any trail at that time, did you?

A. No, I went right up on the trail.

Q. When you got up to the screen had the screen started to spill over again?

A. Yes, the screen was spilling over again when I got up there.

Q. You understood that Clauson had started it before?

A. I didn't know anybody had been there until I got up there.

(Testimony of James E. Higgins.)

Q. When you got up there the screen had started spilling, anyway? A. Yes, sir.

Q. What did you do?

A. I gave it about a quarter of a turn over,—I turned the screen over so that the water had a clean place to run through and it ran through the screen into the penstock.

Q. Then what did you do?

A. I re-fused the motor and started it up.

Q. That is all there was to do? A. Yes, sir.

Q. Then did the screen spill over any more after that? A. Not to my knowledge.

Q. I mean while you were there—while you observed it? A. Not while I was there; no.

Q. That stopped it. Now, Mr. Higgins, you found the fuse had been blown?

A. There was two fuses blown on the switch.

Q. The power was on when you got there, wasn't it? A. Yes.

Q. The power was on that circuit—No. 15 circuit?

A. Yes, sir.

Q. And if the starting switch had not been thrown in that [748] would blow out the fuse, wouldn't it?

A. If the power went off and nobody had been there to pull the starting switch out and the power came on again the fuse would have been blown.

Q. That is what I mean,—if the power on No. 15 circuit went off of course the trommel screen would stop? A. Yes, sir.

Q. Then if the power came on afterwards that

(Testimony of James E. Higgins.)

would burn the fuse out? A. Yes, sir.

Q. That is what the fuse is there for?

A. Yes, sir.

Q. If the fuse wasn't there it would burn the motor out, is that the idea? A. Yes, sir.

Q. And the fuse had burned out and you had to re-fuse it? A. Yes, sir.

Q. And if you had been there before the power came on you have a starting switch that you can throw on to keep it from burning out the fuse?

A. Yes, sir.

Q. That starting switch had not been thrown on?

A. No.

Q. If the power came on while it stood on the running switch it would blow the fuse?

A. Yes, sir.

Q. And you re-fused the motor and started it?

A. Yes, sir.

Q. And that is all there was to it? A. Yes, sir.

Q. Now, how long after that motor at the trommel screen had stopped would it retain any heat at all?

A. It would retain the heat for a while; but in half an hour the temperature would drop so that a person who was familiar with the running heat of that motor would have noticed it. [749]

Q. If it stood still for an hour what would its condition be with reference to being hot or cold?

Q. It would be almost the temperature of the atmosphere in an hour.

Q. It would be practically cold in an hour?

(Testimony of James E. Higgins.)

A. Yes.

Q. And if it was quite warm still, running heat I mean, how long could it have stood still—not to exceed how long?

A. It couldn't stand still more than 15 or 20 minutes and retain its heat very near the running heat.

Q. From then on it would cool off gradually so you could tell how long it had been standing still by feeling of it? A. Yes, sir.

Q. You did not yourself feel of it? A. No, sir.

Q. Did you look at the ground under the spout on that occasion, where you had seen the water drop? A. Yes, I looked at that.

Q. Was there any abrasion of the soil there—any cut, or any evidence that the water had cut away the ground? A. Not that I could see; no.

Q. You could have seen it if there had been any, couldn't you?

A. Yes; there was no abrasion where the water had hit the ground at all.

Q. No abrasion where it ran down the trail?

A. No.

Q. Could you see where the water had been running?

A. I could when I came up the trail there—there is a place where the water came over the trail and over the bank—it showed there where it had washed down a little by the dirt and debris and muck and small rocks, etc.

Q. The trail itself did not show any evidence of wash? A. No.

(Testimony of James E. Higgins.)

Q. Except that one point? A. Yes, sir. [750]

Q. Was there any ice in the trail?

A. Yes, there was; the trail was so icy down below that point, and so slippery, due to the water being in the trail, I had to stay outside of the trail practically all the way up.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. That is because it was so icy? A. Yes, sir.

Q. You know that the motor was still warm when you got up there, don't you?

A. I didn't feel of the motor myself.

Q. You know it was warm?

A. I didn't feel of it so I couldn't say it was warm.

Q. If that motor up there stops, Mr. Higgins, a man has to walk all the way up there to start it again, doesn't he? A. Yes.

Q. In other words, there is no device whereby you can start it or stop it anywhere near the mill or in the mill, is there? A. No.

Q. And all the water that you saw coming over the slide when the fire department was down there was about 5 to 8 gallons an hour?

A. I judge it to be around that amount.

Q. Now, when you saw the water running over the trommel there—

Mr. HELLENTHAL.—Just a minute—I don't think the witness understood the question—counsel said 5 to 8 gallons an hour.

(Testimony of James E. Higgins.)

Mr. RODEN.—You can ask him that question on redirect—shows how reliable he is.

Q. Now, when you saw the water running over the trommel there, that came out in a round stream, didn't it? A. Yes.

Q. Looked that way? [751]

A. Yes, sir.

Q. You know as a matter of fact that a round stream couldn't come out of that trommel, could it?

A. Yes, a round stream could come out of the trommel—that is, the spillway was dished up this way so that the water on the under side would be,—well, something similar to a segment of a circle.

Q. The same moment that the water came out of the mouth of that trommel, even if it were perfectly round, it would have at once begun to spread here, wouldn't it, the moment it left the spout?

A. No, that water did not begin to spread because that spillway was so steep and the water ran down so rapidly that it did not spread out hardly at all—it stayed almost all together in one stream.

Q. All right, but it would necessarily spread?

A. No—I have seen that water run through there a good many times.

Q. When you looked up from Marshall and Newman's after the slide had happened that wasn't running any more?

A. I didn't look up there after I came out of Marshall and Newman's at all.

Q. You looked up to the apex of the slide and

(Testimony of James E. Higgins.)

you saw that 5 or 6 gallons there?

A. I don't think I could see the spillway of the trommel screen there from where I was looking up at the apex of the slide.

Q. But when you noticed that water coming out of that spillway down there at the foundry you moved pretty rapidly to the telephone, didn't you?

A. I walked right along—hurried up my gait a little bit in order to get up there and telephone.

Q. It looked pretty serious to you up there, didn't it?

A. It didn't look so very serious because I had never heard of any damage caused before by the water and I knew that the [752] water had run through there before; but our idea is to keep that screen running so as to get the water down to the mill.

Q. It was just a matter of efficiency to hurry to Marshall and Newman's? A. Yes, sir.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Higgins, counsel asked you how many gallons per hour ran over the top of that slide,—did you mean per hour? A. I meant per minute.

Mr. RODEN.—He said per hour.

Q. Did you say per hour?

A. Well, if I did I made a mistake—I was looking for the counsel to ask me per minute.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of H. G. Nordling, for Defendant.

H. G. NORDLING, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. H. G. Nordling.

Q. Where do you live? A. Juneau.

Q. What, if any, position do you occupy with the Alaska Juneau Gold Mining Company?

A. Foreman in the electrical department. [753]

Q. Did you occupy that same position at the time of the slide? A. I did.

Q. That is January 2, 1920? A. Yes, sir.

Q. Do you know where the trommel screen was at that time? A. I do.

Q. Do you know where the motor was that operated it? A. Yes, sir.

Q. On the day before the slide, January 1st, 1920, were you up there? A. I was.

Q. At what time, do you remember?

A. I am not sure—I think it was in the afternoon.

Q. Some time in the afternoon? A. Yes, sir.

Q. At that time did you examine the motor on the screen? A. Yes, sir.

Q. You went there for the purpose of examining the motor? A. That is part of my duties.

(Testimony of H. G. Nordling.)

Q. That is part of your duties to examine that how often?

A. I made it a duty to go there two or three times a week, anyway.

Q. And you do that with all of your other electrical appliances throughout the system?

A. Yes, sir.

Q. Make those examinations? A. Yes, sir.

Q. On this occasion you made an examination of the motor at the trommel screen? A. Yes, sir.

Q. Was the motor running all right?

A. Yes, sir.

Q. Was the trommel screen revolving all right?

A. Yes, sir. [754]

Q. Was there any water running through the spillway? A. No, sir.

Q. No water coming from the trommel?

A. No, sir.

Q. On the day of the slide where were you sometime after 11 o'clock, when the slide happened?

A. I was about the middle of the mill on what is known as the ball mill motor floor.

Q. What, if anything, happened at that time?

A. The motors in the mill all went dead—that is, they stopped.

Q. You didn't notice at that time whether the lights went out or not?

A. I did not; the lights were turned off in that part of the mill and I wouldn't have known it—it was daylight at that time.

Q. You went from there to where?

(Testimony of H. G. Nordling.)

A. I went from the ball mill motor floor down through the mill.

Q. To what part of the mill?

A. To what is known as the retreatment plant.

Q. Did you see Mr. Summers there later on?

A. I did.

Q. About how long after the motors kicked out did you see Mr. Summers?

A. Possibly fifteen minutes.

Q. Something like that? A. Yes, sir.

Q. You would not be positive, I suppose, as to the minute? A. Oh, no.

Q. Where did you meet Mr. Summers?

A. In the retreatment plant, about the middle of the floor there.

Q. What, if any, directions did he give you?

A. He gave me instructions from Mr. Clauson to proceed immediately to the trommel screen and see what was the trouble.

Q. Did you do so? A. I did. [755]

Q. Which way did you go?

A. I walked the stairs up through the mill to the tippie, the ore train was just about ready to pull out and I got on the locomotive of the ore train and rode out.

Q. You had to wait a little while for the train?

A. I had to wait until they dumped one load, I think it was.

Q. You had to wait a little while before the train started? A. Yes.

Q. And then you got on the train and went over

(Testimony of H. G. Nordling.)

to the trommel? A. Yes, sir.

Q. Whom, if any one, did you meet at the tipples?

A. Mr. Clauson.

Q. He was going to the trommel too?

A. Yes, sir.

Q. And you and he went together? A. Yes, sir.

Q. After you got to the trommel screen what did you observe there?

A. As I came out of the dry-room and went on to the platform of the trommel screen, or penstock as it is known there, I observed first the water coming out of that chute—out of that spout of the trommel. I went right in, and as I went in, as my duties required me, I naturally laid my hand on the motor.

Q. How did you find the motor—was it hot or cold? A. The motor was fairly warm.

Q. Was it standing still or running?

A. Stopped.

Q. And the trommel screen was also standing still? A. The trommel screen was stopped also.

Q. And it was filled up with muck and debris?

A. I didn't examine the screen at all.

Q. How warm was the motor when you put your hand on it, with reference to its running heat,—do you know what its running heat is?

A. Its running heat is about 70 degrees. [756]

Q. How warm was it when you put your hand on it?

A. Oh, the motor, I would think then would have been about 55 or 60—something like that.

(Testimony of H. G. Nordling.)

Q. About 55 or 60 when you put your hand on it?

A. Yes, sir.

Q. Do you know how long it would take that motor to get from its running heat—to cool off to the extent that it was when you put your hand on it?

A. That motor should get cold inside of an hour—to atmospheric temperature.

Q. How long would it take to get from running heat to the temperature it was when you put your hand on it at that time?

A. I should judge it was stopped about half an hour.

Q. Not to exceed that? A. I don't think so.

Q. Did you examine the ground under the spout, Mr. Nordling?

A. Well, the only thing that I noticed was the water coming out of the chute,—there was quite a quantity of water coming out of the chute and I just noticed it hitting the ground there going down the hill.

Q. But you didn't notice whether it made any cut or abrasion in the soil?

A. It wasn't making any cut—it went right straight over the ground as it went down.

Q. It was not making any cut or abrasion?

A. No, sir.

Q. Just flowing down the hill? A. Yes, sir.

Q. In the direction of the trail?

A. It went into the brush there,—there are some

(Testimony of H. G. Nordling.)

small trees and stuff there and I couldn't see just where it went to.

Q. After you got to the trommel you found the power was off, did you?

A. As I went into the trommel the lights were out and I knew [757] that the power was off.

Q. Did you change the switch at all?

A. I didn't touch the switch because I wanted the power on before I did anything with it.

Q. You left the motor on the running switch?

A. I did.

Q. So that the fuse would blow out if the power came on? A. Yes, sir.

Q. Then where did you go?

A. I immediately went back to the mill and called up the power-house — called up Mr. Bauzman in the power-house, and told him to give me current on No. 15 feeder.

Q. That is the feeder that this trommel screen was on? A. Yes, sir.

Q. And the feeder the lights in the tunnel were on? A. Yes, sir.

Mr. HELLENTHAL. — You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. How much time did you spend up there, Mr. Nordling?

A. No time to speak of at all—it wouldn't take me but a minute or two to go in the trommel and right back over to the mill and get the power on.

(Testimony of John Holmquist.)

Mr. RODEN.—That is all.

(Witness excused.)

(Whereupon court adjourned until 1:30 P. M.)

[758]

AFTERNOON SESSION.

April 1, 1921, 1:30 P. M.

Testimony of John Holmquist, for Defendant.

JOHN HOLMQUIST, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. What is your name? A. John Holmquist.

Q. Where do you live? A. Juneau.

Q. At what place in Juneau?

A. Gastineau Avenue.

Q. Where with reference to Portal Gulch?

A. About 6 or 8 feet on the south side.

Q. Do you know where Portal Gulch is?

A. Yes.

Q. Do you know where the trommel screen is?

A. Yes.

Q. You are foreman in the Alaska Juneau mine?

A. Yes.

Q. On the afternoon of January 1st when did you come home?

A. Oh, I left the mine about a quarter to four—I got home about half-past four.

(Testimony of John Holmquist.)

Q. When you got home that day was there any water coming from the trommel screen? A. No.

Q. Was there any water in Portal Gulch?

A. Yes.

Q. How much?

A. Oh, the flume was full—that side flume that is down there.

Q. What is the size of that side flume?

A. It is 3 feet by 2, I think it is.

Q. It is a pipe covered with a flume? [759]

A. No, it is a plank flume.

Q. And it is 3 feet wide and 2 feet deep?

A. Yes.

Q. That is the flume that the city put in in Portal Gulch to take care of the Portal Gulch water? A. Yes.

Q. And runs down to Gastineau channel?

A. Yes.

Q. At your house that flume was running full, was it? A. Yes, sir.

Q. Where was that water coming from?

A. The biggest part of it was coming over the snowshed.

Q. During the night did that water continue to run? A. What?

Q. During the night of January 1st, between January 1st and 2d, was there much water in that flume that night?

A. Yes, there was lots of water in the flume.

Q. During that night did you have to get up to clean the flume out?

(Testimony of John Holmquist.)

A. I was up the night before the slide—I was up a couple or three times to clean the flume.

Q. At that time the flume was running full of water? A. Yes, sir.

Q. And you had to go out and clean out the flume and clean the brush and stuff out of it. How much water was running in Portal Gulch at that time as compared to what there was at other times?

A. Well, I ain't seen so much water there more than once before and that was the time they had the flood at the Casey Shattuck addition.

Q. The time the flood occurred in the Casey Shattuck addition was the only time you had seen as much water there before? A. Yes.

Q. Have you ever seen as much water there since that? A. No. [760]

Q. Did you ever have to get up nights to keep that thing clean any other time except this time and the time of the Casey Shattuck flood?

A. No.

Q. You have lived there for some time?

A. Yes.

Q. What was causing all this water to flow?

A. The rain, of course.

Q. Was there any snow melting—was the snow melting on the hill?

A. Snow on the top of the hill, I guess.

Q. I say was the snow melting so that it made water? A. Oh, yes, the snow was melting.

Q. The snow was melting and running down there? A. Yes.

(Testimony of John Holmquist.)

Mr. HELLENTHAL. — You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. You are foreman for the Alaska Juneau, are you? A. Yes, sir.

Q. How long have you been foreman up there?

A. About eight and a half years.

Q. And your brother Fred is working up there?

A. Yes.

Q. And your other brother too?

A. Yes,—no, Fred isn't working up there now.

Q. He quit a couple of days ago? A. Yes.

Q. You have never seen as much water coming down Portal Gulch as you saw on the 2d of January? A. Yes, I saw it once before.

Q. Yes, except once before, and that was when the Casey Shattuck addition had trouble?

A. Yes, sir. [761]

Q. It was raining very heavily on the 2d of January, wasn't it? A. Raining heavy, yes.

Q. What part of the day did it rain the heaviest?

A. I couldn't tell you—I was underground—I don't know.

Q. It was raining very heavily on the 1st of January too, was it?

A. It was raining heavy in the morning when I went to work.

Q. I am talking now about the 1st of January?

A. The first of January?

Q. Yes. A. I don't remember—I don't know.

(Testimony of John Holmquist.)

Q. You don't know whether it was raining very heavily on the 1st of January or not?

A. I don't.

Q. But on the 2d, in the morning when you went to work, it rained very heavily? A. It did.

Q. And you went to work about 7 o'clock?

A. A little before seven.

Q. And of course you went into the mine then, and when did you come out again?

A. About 2:30.

Q. About 2 o'clock; it was raining just about as heavy then as it was when you went in, was it?

A. I don't remember—I don't think it rained so heavy when I come out.

Mr. RODEN.—That is all.

(Witness excused.) [762]

Testimony of L. Bauzman, for Defendant.

L. BAUZMAN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. L. Bauzman.

Q. Where do you live, Mr. Bauzman?

A. Dayton, Ohio.

Q. Where are you employed?

A. National Cash Register Company.

(Testimony of L. Bauzman.)

Q. Did you ever live in Juneau? A. Yes, sir.

Q. Were you living in Juneau on the 2d of January, 1920? A. Yes, sir.

Q. What were you doing at that time?

A. I was in charge of the power-house of the Alaska Juneau Company.

Q. You were working for the Alaska Juneau Company in charge of the power-house?

A. Yes, sir.

Q. Were you in charge of the power-house in the forenoon of that day? A. Yes, sir.

Q. During the forenoon of that day what, if any, electrical trouble did you have in the power-house between the hours of 9 and 10 o'clock in the morning?

A. About 9:25 there was a disturbance on the line.

Q. On that occasion—I call your attention to a voltage chart, Exhibit No. 11, that is a voltage chart kept in the power-house? A. Yes, sir.

Q. And was kept on that day?

A. Yes, sir. [763]

Q. Does that indicate electrical disturbances that occurred on that morning? A. Yes, sir.

Q. What electrical disturbances were there between 9 and 10? A. There was three of them.

Q. As indicated on that chart? A. Yes, sir.

Q. What time did the first one occur?

A. 9:25.

Q. And the second one? A. About 9:35.

Q. When was the next one? A. About 9:45.

Q. Now, during the time that these electrical dis-

(Testimony of L. Bauzman.)

turbances happened, Mr. Bauzman, did any of the circuit-breakers in the power-house that control the various circuits kick out?

A. Not the circuits going up to the mill or any of our power plants—nothing at all.

Q. None of your circuits going up kicked out at that time? A. No.

Q. Between 9 and 10. Now, did you have any further electrical disturbances that forenoon?

A. We did after 11 o'clock.

Q. Now, that chart indicates another drop of voltage at about 11:10, doesn't it? A. Yes.

Q. At that time what did you notice on the switch-board?

A. Well, I noticed the lights—they sort of went down, and they were down probably four or five seconds, and then they come up, and then they went down,—there was about three of those, a little interval between.

Q. Three flickers on the line—on the switch-board? A. Yes, sir. [764]

Q. What did that indicate with reference to short circuits?

A. It looked like a series of short circuits.

Q. Indicated three short circuits with short intervals between?

A. Yes, I imagine 3 or 4 minutes between.

Q. How are those three short circuits indicated upon the voltage chart?

A. It shows a drop in voltage, but the line is a little wider than the average mark—shows a little wider mark.

(Testimony of L. Bauzman.)

Q. The time in between each drop in voltage wasn't sufficient to make separate lines?

A. No.

Q. The instrument is not fine enough for that?

A. No, the distance is too close there.

Q. Too close together and it shows as one line on the chart? A. Yes, sir.

Q. But you saw the three drops in voltage on the switch-board? A. I did.

Q. At that time what, if anything, happened to any of the feeders that leave the power-house for the various parts of the property to supply current?

A. At the time these three—

Q. Yes, sir.

A. Fifteen kicked out.

Q. That is the feeder that goes to the trommel screen, to the lights in the tunnel and to the stamp-mill? A. Yes, sir.

Q. Or don't you know about that, Mr. Bauzman?

A. Yes, sir; I know all about it.

Q. That is feeder No. 15?

A. I know it was No. 15; yes, sir.

Q. That is the one that kicked out at that time?

A. That is it.

Q. Did the other feeders remain in?

A. All of them. [765]

Q. What happened shortly after that?

A. Oh, in about five minutes, I should say, everything went out—the whole business.

Q. All the power went off in the entire system?

A. Yes, sir; everything.

(Testimony of L. Bauzman.)

Q. In the forenoon between 9 and 10 did you observe any flashes?

A. Why, I observed one along about 9:25.

Q. About 9:25 you observed a flash?

A. Yes, sir.

Q. Following that flash did the voltage drop?

A. There was a slight drop in voltage; yes, it did drop because right after the flash I went over and looked.

Q. You went over and looked and saw there was a drop in the voltage. About, you said, 5, 6 or 8 minutes, or something like that, after those first three flashes the power went off?

A. Yes; it was about 5 minutes, I would say, maybe six.

Q. About 5 minutes later all the power went off. Now, at the time that that power went off, what, if anything, happened in the way of a telephone ring in your office?

A. Why, just about the time that went off, everything went dead, I heard the phone ring—I didn't answer it myself.

Q. Why didn't you answer it?

A. I was busy at the board.

Q. You were too busy at the board with those shorts—who did answer it?

A. An electrician by the name of Summers.

Q. After Summers answered the phone do you know where he went?

A. He came out and told me who called up and where he was going.

(Testimony of L. Bauzman.)

Q. Who was it that called up? A. Higgins.

Q. Earl Higgins—where did he say he was going?

A. He said he was going to the mill after Nordling.

Q. That was directly after everything went dead?
[766]

A. Yes, sir; about the same time—I should judge about half a minute, or something like that.

Q. Then what did you do?

A. After everything went dead?

Q. Yes.

A. I went out to the tower—that is, the tower just outside of the plant, and we cut off Nugget Creek.

Q. You cut off Nugget Creek? A. Yes, sir.

Q. What did you do that for?

A. We knew we had trouble and didn't know where it was so that was our first operation.

Q. That left the power connected with Sheep Creek only?

A. It left the switches all closed with Sheep Creek.

Q. Then what did you do after that?

A. I come back in the power-house and I didn't see any lights so I phoned Sheep Creek to bring the voltage up to normal.

Q. And that brought the power back on the line?

A. Yes, sir; after I had called.

Q. At that time did you throw in any of the switches? A. No.

Q. After Sheep Creek got back on the line how long was it before you threw in the switch going

(Testimony of L. Bauzman.)

up the direct current line to the trolley?

A. It must have been a couple of minutes because after I had phoned I took a look at Gastineau to see if they had juice, and that took me a minute or maybe two minutes, and then I went and threw in that direct rotary through there.

Q. That was the first one you three in?

A. Yes, sir.

Q. You threw that in so they would get power up on the tramline? A. Yes, sir.

Q. And could run the trains?

A. Yes, sir. [767]

Q. Now, did you throw in No. 15 at that time, or didn't you throw that in until later?

A. We waited until we got a telephone call.

Q. You left 15 out until you got a telephone call?

A. Yes, sir.

Q. And when did you get a telephone call—how much later?

A. That would be about 20 or 25 minutes, I guess.

Q. After the power went off? A. Yes, sir.

Q. Who called you?

A. Nordling, the electrician in the mill.

Q. Then what did you do with reference to switch No. 15? A. Threw it in.

Q. Then they had power on circuit No. 15?

A. Yes.

Q. While all this was going on on this morning did you notice Mr. Wert Newman come into the power-house? A. Yes, sir.

(Testimony of L. Bauzman.)

Q. About how long after the entire business was dead did he come in?

A. Oh, it was about 10, maybe 12, minutes.

Q. And Mr. Summers had gone to the mill in the meantime?

A. He had gone before Wert got in there.

Mr. HELLENTHAL.—That is all; you may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. When did you leave here, Mr. Bauzman?

A. What year?

Q. Yes.

A. The last day of September, last year.

Q. September, 1920; and you were sitting here yesterday when this man Newman was testifying, weren't you? A. Sure. [768]

Q. And you heard him say it was about 10 or 12 minutes after the power went out that he got down to the power plant, didn't you?

A. Perhaps he did.

Q. And it wasn't 13 minutes, was it, as near as you can get it?

Mr. HELLENTHAL.—I object to that question because it is putting a statement before the witness that is not accurate, because Mr. Newman didn't testify how long it was after the power went off that he came in—he didn't know.

The COURT.—It is immaterial so far as the examination of this witness is concerned what some other witness said.

(Testimony of L. Bauzman.)

Mr. RODEN.—I am asking if it wasn't 13 minutes.

The COURT.—Then ask him that question without any reference to what Mr. Newman or anybody else said.

Mr. RODEN.—I want to refresh his memory as to where he got his information from.

Q. It wasn't 13 minutes after the power went off that Newman came in there, was it?

A. I said it was between 10 and 12 minutes when he came in there.

Q. Was it 11 minutes?

A. I don't know what it was,—I said it was between 10 and 12.

Q. It wasn't any less than 10?

A. I wouldn't say so.

Q. And no more than 12—you remember exactly the time, do you? A. Yes, sir.

Q. How do you happen to be here, Mr. Bauzman?

A. Up in this country?

Q. Yes. A. I was sent for.

Q. Who sent for you? A. Mr. Bradley.

Q. And since you got here you have talked this matter over a good deal with him, haven't you?

A. Maybe and maybe not. [769]

Q. What have you done?

A. A general view of it?

Q. Yes. A. I told him what I knew, was all.

Q. And you have talked to the other electricians about this matter, haven't you? A. Some.

Q. Sure, just a very little?

(Testimony of L. Bauzman.)

A. We discussed the case, sure.

Q. And you have been attending court here ever since you came, haven't you? A. No.

Q. Pretty nearly all the time?

A. I think almost about two days.

Q. You haven't been here very long?

A. No, sir.

Q. When a disturbance is indicated in the power-house you cannot tell on what line it occurs, can you?

A. We cannot tell exactly but we know just about the direction—we could see the direction of that flash.

Q. Direction of what flash?

A. That I saw in the morning.

Q. Did you see a flash in the morning?

A. I did.

Q. About when was that? A. About 9:25.

Q. And of course that flash would be an absolute indication as to where a disturbance might occur at 11:15? A. No, sir.

Q. Might have occurred for all you know in Nugget Creek, might it not?

A. No; you couldn't see that far.

Q. I am asking you if the disturbance at 11:15 might not be caused by some disturbance on the Nugget Creek line? [770]

A. We didn't know where it came from.

Q. What line were you working on that day?

A. I wasn't working on any line.

Q. I am asking you what power lines you were

(Testimony of R. R. Young.)

getting power from into your station that day?

A. The Nugget Creek, the Sheep Creek, and the 240 from Treadwell and the Gastineau.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of R. R. Young, for Defendant.

R. R. YOUNG, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. R. R. Young.

Q. Where do you reside, Mr. Young?

A. Juneau.

Q. What do you do—what is your occupation?

A. Agent for the Pacific Coast Coal Company.

Q. Were you so employed on the 2d day of January, 1920? A. Yes, sir.

Q. On that day do you recall the slide that is the subject of inquiry? A. Yes, sir.

Q. Where were you at the time this slide happened, Mr. Young?

A. Standing in the hopper at the old dock at the foot of Main Street.

Q. In the hopper of the old dock of the Pacific Coast Company at the foot of Main Street?

A. Yes, sir. [771]

Q. From where you were did you have an unobstructed view of the slide area? A. Yes, sir.

(Testimony of R. R. Young.)

Q. What, if anything, directed your attention to the slide? A. Flashes.

Q. Those were the flashes that occurred when the tower fell?

A. Yes, it was a steel tower falling, and the wires breaking.

Q. You didn't see the flashes before that, I believe? A. No, sir.

Q. The first flash you saw was the big one when the tower fell?

A. There were several flashes—I don't know how many—quite a lot.

Q. The whole thing went by like lightning?

A. Yes, sir.

Q. That was the time the slide was coming down the hill? A. The slide was on its way then.

Q. Now, the buildings had already started and gone a considerable distance down the hill before the tower fell?

A. When the tower fell, when the flashes were taking place, I don't know which buildings it was, but the buildings were breaking through the bridge—the Gastineau Avenue bridge just about the same time.

Q. About the same time that you looked up did you discover the slide area after the buildings had settled? A. Yes, sir.

Q. Did you observe the place where the slide had broken loose—the top or apex of the slide area?

A. Yes, sir.

Q. At that time was there any water coming over

(Testimony of R. R. Young.)

that top or apex? A. No, sir.

Q. How long did you observe that?

A. Probably for a minute or two.

Q. And you are positive there was no water coming at that point at that time? [772]

A. Yes, sir.

Q. Then where did you go?

A. I came down the ladder and went over to the slide—went in back of Cordes' store.

Q. Where the slide had occurred? A. Yes, sir.

Q. You went to the slide? A. Yes, sir.

Q. When you got there and on your way down there did you see the apex or the top of the place where the slide had broken loose—when you first got there?

A. Yes; when I got in front of the soda works.

Q. You then observed the top where the slide had broken loose? A. Yes; I looked up there.

Q. At that time when you were in front of the soda works was there any water coming over the top of the slide? A. No, sir.

Q. That is, referring to the place where the ground had broken loose? A. Yes, sir.

Q. And you are positive there was no water coming there at that time? A. Yes, sir.

Q. How long after that was it before water did commence to come over there?

A. Well, as near as I can figure it out it was anywhere from 5 or 6 to 7 or 8 minutes—maybe 9 minutes—somewhere along there.

(Testimony of R. R. Young.)

Q. And when the water did commence to come how much was coming?

A. I didn't see the start of it, but about half a minute afterwards, I should judge, I observed it and there was quite a stream.

Q. It was a white looking stream as you looked at it?

A. Yes, sir; a white looking stream—white looking water coming [773] pretty heavily

Q. It wasn't brown or muddy—it looked white?

A. It wasn't brown or muddy water.

Q. It may not have been clear water but it was water that looked white when you looked at it?

A. Yes, sir.

Q. The stream would be how wide passing over the apex of the slide? A. From 3 to 4 feet.

Mr. HELLENTHAL.—Quite a stream. You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. As I understand, you were down here on the old Pacific Coast dock? A. Yes, sir.

Q. And your attention was first attracted by an electrical flash? A. Yes, sir.

Q. Which you saw, I think you said, a little above the slide?

A. Where the line, is,—where the power line goes.

Q. You don't know what caused the flash, do you?

A. I am pretty certain it was the tower falling and breaking the wires.

Q. All right, it was the tower falling. Now, when

(Testimony of R. R. Young.)

you saw this flash that mass was moving, wasn't it—the slide mass was then moving?

A. When I first looked up there while these flashes were taking place the buildings or earth or whatever it was, was moving.

Q. And then you stepped down as soon as you could? A. No, I waited until it all settled.

Q. All right, you waited until it all settled, and then you went down below? A. Yes, sir.

Q. And went to the scene of the slide as fast as you could, I suppose? [774]

A. No, I didn't run.

Q. But anyhow you got there and you took your position around the soda works somewhere?

A. I rested there a minute to see if it was safe to go back up in there.

Q. And by this time the fire department had got down there? A. Just arrived.

Q. You didn't see any water there?

A. No, sir.

Q. And you saw no water, I believe you said, until 6 or 7 or 8 minutes later on?

A. No, 6 or 7 or 8 minutes from the time the slide started, probably two or three minutes after the time I stepped in front of the soda works.

Q. So practically we agree on the proposition that you saw water there probably ten minutes after the slide started? A. From 5 to 10 minutes.

Q. And the water you saw, do you know where that water came from, Mr. Young?

A. No, sir; it came out of the trees.

Q. Came out of the trees? A. Yes, sir.

(Testimony of R. R. Young.)

Q. And hit into the slide area?

A. Right square over it.

Q. Did you see the mud and material that had then flooded Goldstein's store?

A. No, I passed right by Goldstein's store—I never stopped at all.

Q. You didn't pay any attention to it?

A. No, I was further down the street.

Mr. RODEN.—That is all.

(Witness excused.) [775]

Testimony of George R. Jorgenson, for Defendant.

GEORGE R. JORGENSEN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name, Mr. Jorgenson.

A. George R. Jorgenson.

Q. Where do you live? A. Juneau.

Q. What is your occupation? A. Mechanic.

Q. Were you living here on the 2d of January 1920, the day of the slide? A. Yes, sir.

Q. Where were you when the slide happened?

A. In the Alaska Auto Supply Company.

Q. What, if anything, drew your attention to the slide? A. The noise.

Q. After hearing the noise what did *you*?

A. Went out to see what it was.

Q. Did you then observe the slide and the place

(Testimony of George R. Jorgenson.)

from which it had broken loose?

A. To a certain extent, yes.

Q. Now, was there any water running over the top of the slide, where the slide had broken loose up there at the uppermost part—at the apex?

A. I didn't notice any.

Q. Not at that time. After that you went into the slide area, I believe? A. Right away.

Q. Then did you have occasion later on—did you hear a warning about looking up or looking out?

A. Yes. [776]

Q. Did you look up to see whether there was any danger? A. I did.

Q. Did you look up then to the place where the slide had broken loose? A. Yes.

Q. Was there any water coming at that time?

A. I didn't see any.

Q. And you were looking right at it at that time?

A. Yes, sir.

Q. For that purpose. Later on did you see water coming over there? A. Yes, sir.

Q. Later on there was quite a stream?

A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. About how long, Mr. Jorgenson, was it before you saw any water after the slide?

A. Well, I couldn't say exactly—might have 5 or 6 or 10 minutes.

Q. You were then on top of the slide practically speaking?

(Testimony of George R. Jorgenson.)

A. No, I was just about at the bottom of it,—oh, when I saw the water, you mean?

Q. Yes.

A. I was in the street.

Q. Did you see the water before you went up into the slide? A. No.

Q. As a matter of fact, you didn't see any water until after what has been called the second slide; is that true?

A. I didn't see the water until I got out on the street.

Q. But you remember somebody hollering, "Look out, there is another slide coming"?

A. Yes.

Q. And a small amount of material broke loose then? A. Yes, sir. [777]

Q. It wasn't much. Up to that time you hadn't seen any water coming?

A. Previous to that time?

Q. Up to that time, yes.

A. No, I hadn't seen any water.

Q. You were working for Jim Connors?

A. I was then.

Q. In his shop down there on Front Street?

A. Yes.

Q. When you went into the slide was the fire department down there? A. I didn't see it.

Mr. RODEN.—All right. That is all.

(Witness excused.)

Testimony of M. S. Sutton, for Defendant.

M. S. SUTTON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. M. S. Sutton.

Q. Where do you live? A. On 6th Street.

Q. In Juneau? A. Yes.

Q. What is your occupation,—what do you do?

A. Architecture and building.

Q. Were you living here on the 2d of January, 1920, at the time this slide occurred? A. I was.

Q. Where were you engaged at that time,—where were you?

A. At the old Pacific Coast dock building a little tram into [778] that dock for handling coal from the steam boats.

Q. What, if anything, drew your attention to the slide? A. The noise.

Q. Now, from the point where you were working did you have an unobstructed view of the slide area?

A. I did—part of it.

Q. Did you have an unobstructed view, I mean, of the upper part of the slide area? A. Yes.

Q. After hearing the noise did you look up?

A. I did.

Q. What did you see?

A. I saw the final settlement,—I thought I saw the last end of the slide settling down.

(Testimony of M. S. Sutton.)

Q. At that time did you observe the upper part of the slide area,—the apex of it, from the point where the slide had broken loose? A. Yes.

Q. Was there any water coming over there at that time? A. No appreciable amount.

Q. How long did you look at it at that time, Mr. Sutton? A. Oh, perhaps half a minute.

Q. Was there any water coming down there over that point while you were looking? A. No.

Q. And from then on you didn't see any more of it, I believe? A. No, I didn't.

Q. You went back to your work? A. Yes.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Who else was down there, Mr. Sutton, at the Pacific Coast dock? [779]

A. Mr. Jackson was helping me.

Q. Do you know Jim Morrison? A. Yes.

Q. Was he down there too?

A. He was on that dock but he was on another building beyond.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Bruce Brown, for Defendant.

BRUCE BROWN, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Bruce Brown.)

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. Bruce Brown.

Q. Where do you live, Mr. Brown? A. Juneau.

Q. Were you living here on the 2d of January, 1920? A. I was.

Q. Where were you employed at that time?

A. Brunswick Bowling-alleys.

Q. During the forenoon of that day were you there, when the slide took place? A. I was.

Q. What, if anything, drew your attention to the slide? A. The noise.

Q. After hearing the noise of the slide what did you do? A. I went out on the street.

Q. After you got out on the street, Mr. Brown, could you see the point from which the slide had broken loose?

A. That was practically the only point I could see.
[780]

Q. That was practically the only point that you could see?

A. Outside of down at the street where it came.

Q. The buildings obscured your view of the slide from where you were? A. Yes, sir.

Q. In looking over the buildings you could see nothing but the apex from which the slide had broken loose? A. Yes, sir.

Q. Did you observe it at that time? A. I did.

Q. Was there any water coming over that apex while you were looking at it? A. No, sir.

Mr. HELLENTHAL.—You may cross-examine.

(Testimony of Bruce Brown.)

Cross-examination.

(By Mr. RODEN.)

Q. What did you see on the street, Mr. Brown?

A. At the street I seen the building of Mr. Goldstein's apartment house—it leaned over against the buildings on the street.

Q. Did you see anything on what you call Front Street or Franklin Street—that is what I mean?

A. On Front Street?

Q. Yes.

A. I seen the apartment house of Mr. Goldstein—it leaned over against the buildings which are on Front Street.

Q. Did you see any dirt or rocks or rubbish on Front Street? A. Not at that time.

Q. When did you see that?

A. I seen that perhaps 8 or 10 minutes later, I should judge.

Q. You didn't look in that direction when you first looked up, did you?

A. I went down there about 4 or 5 minutes afterwards. [781]

Q. Yes, but I mean when your attention was first called to the slide?

A. When my attention was first called to the slide did I see any dirt coming out on Front Street?

Q. Yes.

A. No, I didn't notice any dirt then.

Q. You got down there about 5 minutes afterwards?

A. I should judge about 5 minutes afterwards.

(Testimony of Bruce Brown.)

Q. What did you see down there then?

A. I stood in front of the Alaska Soda Company—at that time they gave the alarm the second slide was coming and I stayed there for a minute or two and came back and opened up my place.

Q. At the time the warning was given that the second slide was coming you didn't see any water coming down there?

A. At that time the water was coming over the apex of the slide.

Q. And that is the first time that you saw it?

A. Yes, that was the first time I saw it.

Q. Before that you hadn't noticed any water running out of Goldstein's store?

A. I didn't notice Goldstein's store before, but I noticed his store when I came back to the Alaska Soda Works—at that time there was water coming out of the door.

Q. But before the second slide when you went to the soda works there you didn't see anything coming out of Goldstein's store at all?

A. I didn't notice it at that time.

Mr. RODEN.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. You didn't look for it, did you?

A. I did not.

Q. It didn't come in your way? A. No.

Mr. HELLENTHAL.—That is all. [782]

(Testimony of Bruce Brown.)

Recross-examination.

(By Mr. RODEN.)

Q. You were trying to see what had happened there, weren't you?

A. I just ran down there—I was on the opposite side of the street and I ran down to where I could see the slide.

Q. Why didn't you run over on the same side of the street the slide was on?

A. That wasn't the course I took.

Q. It was a matter of precaution, wasn't it?

A. No, it wasn't a matter of precaution.

Q. You passed Goldstein's store on the other side of the street? A. Yes, sir.

Q. And you were looking to see what had happened?

A. I knew what had happened, what had slid, but I didn't notice Mr. Goldstein's building.

Q. Didn't see any slide material at all around there? A. I did when I came back.

Q. I am asking you about when you went down?

A. No, sir.

Q. Was the fire department there when you got there? A. The fire department was there, yes.

Q. Still you saw no water?

A. I didn't look for it at the time I went down there.

Q. You didn't look for water and you didn't notice anything? A. No.

Mr. RODEN.—That is all.

(Testimony of Bruce Brown.)

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. You didn't notice anything at the foot of the slide, at Goldstein's store there when you passed by it?

A. I didn't notice anything at Mr. Goldstein's store; no, sir.

Q. You looked at the apex of the slide when you were at your own store because you couldn't see anything else? A. That was all I could see, yes.

Mr. HELLENTHAL.—All right, that is all.

(Witness excused.) [783]

Testimony of J. B. Marshall, for Defendant.

J. B. MARSHALL, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. J. B. Marshall.

Q. Where do you live, Mr. Marshall?

A. Juneau.

Q. Were you in Juneau on the 2d of January, 1920? A. I was.

Q. Where were you at the time the slide occurred on that day?

A. I was sitting in the office of Judge LeFevre above the Alaska Soda Bottling Works, talking to him.

(Testimony of J. B. Marshall.)

Q. Where is that office with reference to the place where the slide occurred?

A. It is almost directly in the path of the slide if it had continued.

Q. Across the street from it? A. Yes.

Q. How was your attention drawn to the slide, Mr. Marshall?

A. The flash and the noise,—the flash of light as wires broke, I presume it was.

Q. When you looked out what did you see?

A. When I looked out I saw a mass of debris, houses and timbers and whatever there was, coming down the hill.

Q. What did you do then?

A. I first ran to the back of the building because I didn't know whether it was going to come across the street or not.

Q. After the buildings had settled where did you go?

A. As soon as I heard the buildings settle—the slide settle, I came back to the front room of Judge LeFevre's office and looked out at the slide.

Q. Did you at that time observe the top or apex from which the [784] slide had broken loose?

A. I first looked at the top for the purpose of seeing from where it had come exactly.

Q. You surveyed that portion of the slide area from which the mass had come? A. Yes.

Q. At that time was there any water running over the top or apex of the area from which the slide had broken loose? A. There was not.

(Testimony of J. B. Marshall.)

Q. How long did you remain there at that time?

A. I stayed in the building, in Judge LeFevre's office, I cannot say exactly how long, but stood there watching the situation for a little bit—it may have been a minute, I wouldn't think it was more—it wasn't long.

Q. During that time you had an unobstructed view of this top or apex of the slide? A. Yes.

Q. And during any of that time while you stood there was there any water coming over that slide area?

A. I cannot remember that I looked specifically at the top any more than once, as I first viewed the slide—I don't know that I continued to keep my eyes on that.

Q. You do, however, remember looking once at the top?

A. Definitely, when I took my first view to see where the slide had come from.

Q. You then looked definitely at the top?

A. Yes, sir.

Q. But during the remainder of the time you were sizing up the situation generally, you mean?

A. I think likely so,—I haven't any definite recollection of looking at the top any more.

Q. Where did you go from there?

A. I went down the street and was there for a little while, I don't know exactly how long. [785]

Q. Did you during that time observe the slide area?

A. Not for the purpose of seeing if there was

(Testimony of J. B. Marshall.)

any water, no, nor did I see anything of that kind.

Q. Then where did you go?

A. I went up to my office in the Goldstein building.

Q. Now, as you went up into the Goldstein building did you observe the slide area from the window?

A. Yes; when I got to the fourth floor I got out and looked at the slide area—at the apex of it.

Q. Then what, if anything, did you see in the way of water coming over the top or the apex of the slide at that time?

A. I saw what I took to be water, and went in my office and got my glasses for the purpose of looking definitely at it to see whether it was or not.

Q. That was the first time that you had seen water at that point? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. Did you see any water coming from the penstock that morning, Mr. Marshall?

A. I have no definite recollection on that point.

Mr. RODEN.—That is all.

(Witness excused.) [786]

Testimony of John McNaughton, for Defendant.

JOHN McNAUGHTON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of John McNaughton.)

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is John McNaughton?

A. Yes, sir.

Q. And you live in Juneau, Mr. McNaughton?

A. Yes, sir.

Q. Were you living here on January 2, 1920, the day this slide occurred? A. I was; yes.

Q. Where were you when this slide happened?

A. Down in front of the old Pacific Coast dock.

Q. From where you were in front of the old Pacific Coast dock could you see the slide,—did you have an unobstructed view of it? A. Yes, I did.

Q. You could see it. Now, what drew your attention to the slide?

A. Well, I was standing with one of the crew off the steamer "Redondo" and he attracted my attention to a flash, and I looked up and seen a building going through Gold Street, I guess, and that is all that I seen.

Q. You saw the buildings going through Gold Street and the slide settling down? A. Yes.

Q. At that time did you see the whole slide area, from where you were, where the slide had broken loose? A. Yes, I seen it.

Q. Was there any water coming over the top from which the slide had broken loose, at that time?

A. No, not that I know. [787]

Q. You then went to the slide, I believe?

A. I did; I went down to the front of the big barn, around, and went down the alley to Ferry Way

(Testimony of John McNaughton.)

there, and went down to the house.

Q. You had a cabin in that slide area, didn't you?

A. Yes.

Q. And you went down to look after your own affairs? A. I did.

Q. Look after your own things. After that did you see water coming over the top of that slide, some time after that, or did you not observe any?

A. I didn't take notice.

Q. After that you were looking after your own things and didn't take notice? A. No.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. You didn't see any water coming out of the penstock, Mr. McNaughton, did you

A. I have never been up there.

Q. I mean on this occasion—on this morning?

A. No.

Mr. RODEN.—That is all.

(Witness excused.) [788]

Testimony of Mrs. George Hayne, for Defendant.

MRS. GEORGE HAYNE, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Mrs. George Hayne.

(Testimony of Mrs. George Hayne.)

Q. Where do you live? A. In Juneau.

Q. Were you living in Juneau on the 2d day of January, 1920, the day of this slide? A. I was.

Q. Where were you living in Juneau at that time?

A. Over Mr. Graves' clothing store.

Q. Over Mr. Graves' clothing store on Front Street? A. Yes, sir.

Q. In the second story? A. Yes, sir.

Q. From where you were living in the second story of that building, from your window, did you have an unobstructed view of the slide area where the slide happened? A. I did.

Q. What drew your attention to the slide on that occasion? A. Noise.

Q. After hearing the noise did you look out?

A. I did.

Q. What did you see?

A. I seen the last part of a house come down the hill.

Q. You saw the houses come down the hill?

A. Yes, sir.

Q. Did you stay there and observe the slide for a minute or so at that time? A. I did. [789]

Q. Did you see the top of the area from which the slide had broken loose—the apex—the uppermost part? A. Yes, sir.

Q. At that time was there any water running over that point? A. No.

Q. How long did you remain there at that time, Mrs. Hayne?

A. I remained there about two minutes.

(Testimony of Mrs. George Hayne.)

Q. During any of that time you were watching it, during the first couple of minutes, was there any water running over the top from where the slide had broken loose? A. No.

Q. Then where did you go?

A. I went to the back part of the house to wake the other occupants.

Q. How long did that take you?

A. A very few minutes.

Q. Did you return to the window? A. I did.

Q. When you first got back to the window was there any water running over the apex where the slide had broken loose? A. Not at first.

Q. How long after you had gotten back there before the water came over the top of the slide area?

A. About two minutes, I should judge.

Q. Then you saw water running over the top of the slide? A. Yes.

Q. The place where it had broken loose?

A. Yes.

Q. Quite a lot of water, Mrs. Hayne, was it?

A. No.

Q. But big enough so you could see it well?

A. Yes.

Mr. HELLENTHAL.—That is all. [790]

Cross-examination.

(By Mr. RODEN.)

Q. You had a pretty clear view of it up there, Mrs. Hayne, from your window? A. Yes.

Q. Could you see the flume?

(Testimony of Mrs. George Hayne.)

A. I don't know whether I could see the flume or not—I wasn't looking at it.

Q. Did you see the penstock?

A. I don't know what you have reference to, Mr. Roden.

Q. That was a little building at the end of the tunnel, highest up on the sidehill. A. No, sir.

Q. Did you see any water coming out of there that morning? A. Not at the time.

Q. You didn't see any water on the sidehill when the slide happened? A. Not at first.

Q. And the only time you saw any was 5 or 10 minutes later? A. Yes.

Q. You didn't see any water in any of the gulches up there that morning either, did you?

A. Not where the slide had occurred.

Q. This side of the slide a little gulch coming down there—did you see any water coming down there?

A. Yes, all along the hill, but that was further this way.

Q. You saw water coming all along the hill, did you?

A. Little streams had been running down there every day.

Q. What was the closest stream that you saw to the slide?

A. I couldn't tell you—I am not a good judge of distance.

Q. You can give us an idea—about as far as the courtroom is wide?

(Testimony of Mrs. George Hayne.)

A. Well you can see from here where the other little gulch is where the water runs down when it rains very much. [791]

Q. It was raining quite a bit this morning, wasn't it? A. Yes, it had been raining for a few days.

Q. It was raining hard just about the time of the slide, wasn't it?

A. Yes, it had been raining quite a bit before the slide.

Q. That was one of the heaviest rains you ever saw around here? A. Yes, sir.

Q. How long have you been here, Mrs. Hayne?

A. I will be here two years in Juneau.

Q. Were you here at the time of the Casey Shattuck flood?

A. No—I don't know when that occurred.

Q. Occurred in September, 1918.

A. No, I wasn't here—it will be two years in June.

Mr. RODEN.—That is all.

(Witness excused.)

Mr. HELLENTHAL.—Your Honor, it has been agreed between Mr. Roden and myself that the testimony of Mrs. Eberhart, given in the trial of Koski against the Alaska Juneau Company, may be read in this case by the stenographer, from the notes she took at that time.

Mr. RODEN.—That is all right.

The COURT.—Very well.

(Whereupon the testimony of Mrs. Eberhart was read into the record as follows:) [792]

Testimony of Mrs. Virginia Eberhart, for Defendant.

MRS. VIRGINIA EBERHART, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Mrs. Virginia Eberhart.

Q. Did you live in Juneau at the time this slide happened that we are inquiring about?

A. I did.

Q. Where was your home—your residence?

A. 52 Gastineau Avenue.

Q. Would that be up near where the slide happened? A. Yes, about a block from the slide.

Q. Which direction?

A. It would be north from the slide.

Q. Gastineau Avenue is the street that runs right over the slide area, is it not? A. Yes, sir.

Q. And you were living on that street, about a block or two blocks or a block and a half this side?

A. Yes, sir.

Q. What, if anything, drew your attention to the slide on that occasion? A. I heard a noise.

Q. After hearing the noise what did you do?

A. I rushed out on the porch.

Q. You were in the house when you heard the noise? A. Yes, sir.

(Testimony of Mrs. Virginia Eberhart.)

Q. And you went out on the porch?

A. Yes, sir.

Q. What did you see when you came out on the porch? [793]

A. The first thing I saw was the electric wires bobbing up and down, up and down.

Q. And what else did you see, if anything?

A. I saw people running up that direction.

Q. Then what did you do?

A. I dressed and went up.

Q. Did it take you long to get ready to get up there? A. About five minutes.

Q. Would it take that long, do you think?

A. It wasn't any longer than that, I am sure.

Q. Then you went up where the people were going? A. Yes, sir.

Q. After you got there,—did you arrive at the slide area? A. Sir?

Q. I say you got to where the slide happened?

A. Yes, sir.

Q. That was the first you saw of it, wasn't it?

A. Yes, the first I saw of it.

Q. When you got there did you observe the slide area and the ground where the slide had broken loose? A. Yes, sir.

Q. Looked the whole thing over—you were right half way up the top of the slide, weren't you?

A. Yes, sir.

Q. Did you observe the top part of the slide area, where the slide had broken loose? A. Yes, sir.

Q. At that time was there any water running

(Testimony of Mrs. Virginia Eberhart.)

over that top area—the top of the slide?

A. No, sir.

Q. There was no water running over it?

A. No, sir.

Q. How long did you remain there?

A. Not very long. [794]

Q. Was there any running water down there while you were there? A. No, sir.

Q. Then you went back to your house?

A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RUSTGARD.)

Q. Did you live on the lower side of the slide or on this side? A. On this side.

Q. In what house did you live there, or what house did you live in?

A. It was a small house on the hill—52 Gastineau Avenue.

Q. Whose house is it?

A. Mr. Gillan's house; I think that is the name.

Q. Tom Gillan? A. Yes, sir.

Q. And you could not see the slide from your house, could you? A. No, sir.

Q. And you were attracted to something by the noise? A. Yes, sir.

Q. And you didn't know at that time what caused the noise? A. No, sir.

Q. But you saw the wires in front of your house—that is the telephone wires? A. Yes, sir.

(Testimony of Mrs. Virginia Eberhart.)

Q. And light wires—you saw them bobbing up and down? A. Yes, sir.

Q. Did you hear the fire-bell? A. I did.

Q. That was how long after you heard the noise?

A. Very shortly.

Q. Well, then, you went in and dressed? [795]

A. Yes, sir.

Q. How long do you suppose it took you to dress?

A. It wasn't any more than five minutes,—it was hardly 5 minutes.

Q. Where did you intend to go and look for the noise.

A. I saw where the people were running towards and I went up there to where they were.

Q. You saw people running? A. Yes, sir.

Q. Up that direction where the slide was?

A. Yes, sir.

Q. There was general excitement, wasn't there?

A. Yes, sir.

Q. And you joined in the excitement?

A. Yes, sir.

Q. And you also went over to look at the slide?

A. Yes, sir.

Q. That was at the end of the street?

A. Yes, sir.

Q. The plank street there? A. Yes, sir.

Q. Now, at that time the houses had slid through the street down towards Front Street and the stairs there? A. Yes, sir.

Q. And people had commenced to dig out the victims? A. I don't know.

(Testimony of R. M. Keeney.)

be soot from the chimneys that I saw give way, and I saw the top of the buildings on the slide, and the top of the Goldstein apartments I think, I am not positive.

Q. Your view was such that you could not see the buildings where they stood but you could see the top where the slide had broken loose?

A. I think I saw the Goldstein apartments but I am not positive.

Q. Whether you observed the top from which the slide had broken loose? A. Yes, sir. [798]

Q. Was there any water coming over there at that time—over that top?

A. Not over the very top of the slide that I can recall, there was no water.

Q. No water at that time? A. No.

Q. Then, Mr. Keeney, where did you go?

A. I went through the Pacific Coast building down the passage over to the ferry landing and over to the slide.

Q. On your way down could you observe the top from where the slide had broken loose?

A. Yes, sir.

Q. Was there any water coming down there at that time?

A. Over the apex of the slide?

Q. Yes.

A. I cannot recollect any.

Q. If there had been any you could recall it, couldn't you? A. I think I would.

Q. You didn't see it?

(Testimony of R. M. Keeney.)

A. Not that I can remember.

Q. After that, Mr. Keeney, you went where—to the slide?

A. I went to the slide direct from that Pacific Coast dock.

Q. Then how long after the slide happened was it when you first saw water coming over the apex of the slide, the point from where the slide had broken loose?

A. Oh, roughly guessing, between 15 and 20 minutes, I guess.

Q. Roughly guessing you put it at 15 to 20 minutes? A. I would put it at that.

Q. Where were you when you first saw it?

A. The first time I saw water coming over the apex of the slide I was in front of the Alaska Soda Works.

Q. At that time when you first saw it there was quite a volume coming, wasn't there?

A. Yes; earth and water and mud, that is what attracted my [799] attention first.

Q. Now, Mr. Keeney, you have lived in Juneau quite a number of years, I believe?

A. Yes, sir.

Q. Did you witness, or do you know of any other slides that happened in that vicinity?

A. I never witnessed any of them in action—I have seen them after they slid down.

Q. What slides did you see in that same vicinity after they had slid down—what slides did you observe?

(Testimony of R. M. Keeney.)

A. There was a slide there in 19,—it would be either 1902 or '3, a little this side of that one; came down the gulch I would judge 200 feet or 250 feet this side of that one, maybe more, maybe less—I wouldn't say positively. That slide I didn't see—if I remember right it came in the night—I wouldn't be positive, but we was up there shortly after it came. And I saw the slide that came down back of the Gastineau—I didn't see that in action but I saw it a few minutes after it came down.

Q. There were two slides back of the Gastineau, weren't there?

A. I don't think I was in town at the time of one of the Gastineau slides—if I was I don't recall it.

Q. That was the early Gastineau slide?

A. Yes.

Q. You recall the slide that occurred there—

A. I recall the slide that occurred there at the time of the Casey-Shattuck flood.

Q. You recall that slide?

A. Yes, I recall that slide.

Q. You didn't witness that slide?

A. I didn't witness the slide—that is, I witnessed the slide, you might say, within ten minutes after it came down.

Q. Where were you at the time the slide happened at the Gastineau? [800]

A. I was in the Consumers' Protective Association.

Q. Did you hear it from there?

A. No, I didn't hear it—my attention was called

(Testimony of R. M. Keeney.)

to it and I looked over on the sidehill and could see where it came from.

Q. Did you immediately go down to where it came from? A. I did.

Q. There was no flume above that slide, was there? A. None that I am aware of.

Q. Was there any water coming out of the Gasteineau Hotel at the time you got there?

A. Yes, sir.

Q. How much?

A. I described it once as a sluice-head—that is about as near as I could come to it.

Q. Where was it coming from?

A. From the hill—down the steps.

Q. Was there any water coming down the alley there?

A. I couldn't say positively but I think it was coming from different places all through there.

Q. Was there any water coming through Wills' store? A. I think there was.

Q. How deep was the water coming through Wills' store? A. I didn't go in—I couldn't say.

Q. There was quite a stream running there, wasn't there? A. I should think so.

Q. Ankle deep, it could be called?

A. I would call it that, yes.

Q. You would call it ankle deep, the water running through Wills' store? A. Yes.

Q. Now, do you know of any other slides on the hillside, Mr. Keeney, during the last 15 or 20 years, up in that neighborhood,—do you remember the one

(Testimony of R. M. Keeney.)

behind Forrest's machine-shop?

A. That slide, my recollection of that, I don't recall seeing [801] that any more than I think I saw them wheeling dirt through the shop, wheeling it away,—I think I remember that, but I don't think I went back of the building.

Q. Do you remember one that came down on the Carroll wharf? A. Yes, sir.

Q. That was when, Mr. Keeney?

A. That was probably 1899 or 1900, something like that, or 1901, I couldn't say positively.

Q. That was about how far this side of where this slide occurred that is now the subject of inquiry?

A. There was two came down by the Carroll wharf. There was one came on the other side of the Carroll wharf, and one on this side,—as I remember they were small slides—not very extensive.

Q. One took down several cabins?

A. That was on this side.

Q. How many cabins did it take down, do you recall. A. I don't recall how many it took down.

Mr. HELLENTHAL. — You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. That slide came down a little gulch, Mr. Keeney, didn't it?

A. It came down,—I couldn't say there was a gulch there—there is a little stream comes down there.

Q. A depression in the mountain-side? A. Yes.

(Testimony of R. M. Keeney.)

Q. And that is also the case in the other slide that you described, you didn't give it any name,—the slide that happened in 1902 or '3?

A. That came down in a gulch down this side of Mr. Goldstein's store.

Q. And when the slide came down back of the Gastineau Hotel, that was the heaviest rain you ever knew in the city of Juneau?

A. That is the heaviest rain I know of right inside of the city [802] of Juneau limits—of course we have had heavier—

Q. That was the heaviest rainfall that you can recall? A. Yes, I guess so.

Q. How long have you been around here, Mr. Keeney? A. 1898,—23 years.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Robert Kennedy, for Defendant.

ROBERT KENNEDY, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Robert Kennedy.

Q. Where do you live? A. Juneau.

Q. How long have you lived here?

A. Since 1914.

(Testimony of Robert Kennedy.)

Q. Do you know where the Koski house formerly stood? A. Yes, sir.

Q. Did you have occasion while the Koski house was standing, before this slide happened, to go to the Koski house? A. Yes, sir.

Q. Were you behind the Koski house?

A. Yes, sir.

Q. Where you could observe the excavation?

A. Yes, sir.

Q. What, if any, excavation was there behind the Koski house, Mr. Kennedy, when you were there before the slide?

A. Well, there was a platform back of the Koski house, runs about—oh, I should say two-thirds of the length of the [803] Koski house, and I think it is 4 or 5 feet wide, this platform, and there is a little abutment of loose rock about that high—I should think 2 feet.

Q. On the back end?

A. On the back end of the house, yes.

Q. And the bank rose up from that platform?

A. Yes.

Q. Or cut in the bank? A. Yes.

Q. How high did it rise, Mr. Kennedy?

A. Oh, I would think it would be anywhere from 12 to 14 or 16 feet—along that.

Q. You wouldn't state the exact distance, but along about that distance?

A. Somewhere along that.

Q. It was higher at the side towards the Bach house?

(Testimony of Robert Kennedy.)

A. Next to the mill—the Alaska Juneau mill.

Q. In that direction the bank was the highest?

A. Yes, sir.

Q. And then the cut came down to where it met the gulch,—I believe there was a gulch emptying in there, wasn't there?

A. There was a little coalshed or something right at the head of the stairs as you go up the steps—I don't know just where the gulch did hit the house.

Mr. HELLENTHAL. — You may cross-examine.

Cross-examination.

(By Mr. RODEN.)

Q. You say that cut was 12 or 14 or 16 feet deep or long?

A. From the top of this curve to the top of the bank it would be 12 or 14 or 16 feet long—in there some place.

Q. Wouldn't it be 20 feet, or 22 feet?

A. No, it wasn't that much.

Q. It wasn't that much? A. No. [804]

Q. Well, 18?

A. No, I don't think it was,—I think 16 feet would be the very extreme limit of it.

Mr. RODEN.—That is all.

(Witness excused.)

Testimony of Amos Benson, for Defendant.

AMOS BENSON, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Amos Benson.)

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name.

A. Amos Benson.

Q. Where do you live? A. I live on 4th street.

Q. You live in Juneau? A. Yes.

Q. How long have you lived in Juneau?

A. Oh, about 18 years.

Q. Do you know where the Koski house used to stand before the slide? A. Yes.

Q. Did you have occasion to go to the Koski house shortly before the slide?

A. I used to haul the ashes and garbage from the Koski house—from all over.

Q. You were engaged in the business of hauling away the ashes at that time?

A. I was in the transfer business at the time, hauling ashes.

Q. In hauling the ashes where did you haul the ashes from? A. From the Koski house.

Q. Where did the ash can used to stand? [805]

A. Back of the house.

Q. Did you observe the bank that was behind the house,—the cut that had been made there?

A. Well, there was a cut there—I couldn't say how it was—there was a cut there on the upper end; the lower end it was down to nothing; it was sloping down like that.

Q. There was no cut down where the gulch was?

A. Not very much.

(Testimony of Amos Benson.)

Q. How high was it at the upper end, where it was highest?

A. I couldn't say—I never measured it—I couldn't say how high it was.

Q. How high would you estimate it, Mr. Benson,—about how high would you say it was?

A. About 10 or 12 feet high, I would say, at the upper end—it looked that way to me.

Q. The ash can that you emptied, was that ever placed so close to the cut that the dirt could slough into it? A. Yes; it was a few times.

Q. What happened when the ash barrel was placed so near the edge of the cut that the dirt could slough into it?

A. It would get full of dirt and it would have to stand because I couldn't handle it.

Q. You couldn't take it because so much dirt was in it?

A. Sometimes I dumped it out and shoveled the garbage in.

Q. The dirt sloughed right off the bank into the ash barrel?

A. Yes, like any bank would sometimes slough off,—any bank will do the same thing.

Q. And there was so much of it that sometimes you couldn't carry the ash barrel away?

A. It wasn't always that way—there was only a few times it happened.

Q. There was only a few times that there was so much dirt which had sloughed into the barrel that you could not carry the barrel away?

(Testimony of Amos Benson.)

A. Yes. [806]

Q. The barrel did not usually stand against the bank?

A. No; stand out near the house—put it on the other side when there was much ashes up there.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RODEN.)

Q. You have talked that over pretty well with Clauson, haven't you?

A. I wasn't saying anything to Clauson except about my finger here.

Q. And Tom McDonald? A. Who is that?

Q. Don't you know Tom—haven't you ever talked to him? A. No—Tom McDonald.

Q. How do you happen to be here?

A. I was called to come up.

Q. Who called you up?

A. I don't know the man.

Q. What does he look like?

A. Kind of a heavy set fellow.

Q. A tall man, isn't he? A. A heavy set man.

Q. Did he have a collar on?

A. I don't know whether he had a collar or not. He came to my house and asked me to come up to the courthouse, is all I know.

Mr. RODEN.—That is all.

(Witness excused.) [807]

Testimony of John Reck, for Defendant.

JOHN RECK, called as a witness on behalf of the defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. State your name. A. John Reck.

Q. Where do you live, Mr. Reck? A. Juneau.

Q. Do you know where the Koski house used to stand? A. Yes, sir.

Q. Were you ever behind the Koski house?

A. Yes, sir; I have been around there several times.

Q. Can you tell me whether there was any cut or excavation behind the house where the house stood? A. There was.

Q. How deep was that cut at its deepest place, approximately?

A. Well, I would say it was from 10 to 15 feet,—I didn't closely observe it—it was cut off—kind of a cut off—I would say anyway from 10 to 15 feet. It was over 10, but I wouldn't want to be positive of the depth of it.

Q. That was at its highest point, then it came down towards the gulch where there was practically no cut? A. Yes.

Mr. HELLENTHAL.—That is all.

(Testimony of John Reck.)

Cross-examination.

(By Mr. RODEN.)

Q. You are president of Mr. Bradley's bank down here?

A. I am president of the First National Bank.

Q. He is a stockholder in it—he owns some stock in it, don't he? A. Yes.

Mr. RODEN.—That is all. [808]

Q. (By Mr. HELLENTHAL.) You also own some stock in it, don't you? A. Yes, sir.

Q. (By Mr. HELLENTHAL.) And a lot of other people own stock in it? A. Yes.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

**Testimony of James E. Higgins, for Defendant
(Recalled).**

JAMES E. HIGGINS, recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Higgins, after the slide was over what condition were your wires in at the point where they crossed the Gastineau wires?

A. Our high line was shorted caused by the Gastineau high line laying down over it.

Q. Were your wires burned off?

A. Our wires were not burned off, but the Gastineau wires, two of them were burned off.

(Testimony of W. B. Hargraves.)

Q. They were burned at that point? A. Yes.

Mr. HELLENTHAL.—That is all.

Mr. RODEN.—No questions.

(Witness excused.) [809]

**Testimony of W. B. Hargraves, for Defendant
(Recalled).**

W. B. HARGRAVES, recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. These slide areas that you have indicated on your map in both cases, both the one behind the Koski house and the one near the mill, do the areas marked on your map represent the chunk that broke loose, or the ground covered by the muck?

A. As far as could determine it represents the area of the mass that broke loose.

Q. And the debris in both cases lies below the point that you have indicated as slide area?

A. Yes, sir.

Q. You haven't made any attempt to show on your map the places where the slide debris laid?

A. No, sir.

Q. That is true in both of these slides?

A. Yes, sir.

Q. Coming now to this trommel screen, you have an arrow there pointing to where it says, "Spout to ground 6 feet"—does that arrow indicate the direction of the spout?

(Testimony of W. B Hargraves.)

A. No; that merely points to the place where the spout is.

Q. Which direction did the spout point—does that show on the map?

A. Yes, that is marked on the map.

Q. Can you place an arrow right where the spout is, indicating the direction which the spout pointed?

(Witness does so.)

Q. That shows it, does it?

A. Yes, sir, approximately.

Mr. HELLENTHAL.—That is all.

Mr. RODEN.—That is all.

(Witness excused.) [810]

Mr. HELLENTHAL. — Now, your Honor, Mr. Roden has agreed with me that the testimony of Mr. Summers, in rebuttal, given at the previous trial of Mary Koski against the Alaska Juneau Company may be read by the stenographer.

The COURT.—Very well.

(Whereupon the testimony of Mr. Summers was read into the record as follows:)

**Testimony of M. B. Summers, for Plaintiff
(Recalled in Rebuttal).**

M. B. SUMMERS, recalled as a witness on behalf of the plaintiff, having previously been duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. Mr. Summers, you are in charge, as you have

(Testimony of M. B. Summers.)

testified already I believe, of the United States Meteorological station at this place?

A. Yes, sir.

Q. And you have the records of that office in your possession? A. Yes, sir.

Q. You have the records of the observations taken by your station during the latter part of December, 1919? A. Yes.

Q. Will you state from your records the amount of snow on the ground at 8 P. M. December 25th to January 9th?

A. 8 P. M. December 25th there was a trace in spots—that is, an amount too small to measure; on the 26th a trace; 27th a trace; 28th, $\frac{3}{10}$ ths of an inch; 29th, $\frac{3}{10}$ of an inch; 30th, $1\frac{7}{10}$ inches; 31st, 4.3 inches; January 1st, 1920, none; 2d, none; 3d, none; 4th, $1\frac{1}{10}$ inches; 5th, $1\frac{8}{10}$ inches; 6th, none; 7th, none; 8th, none; 9th, none.

Q. This, Mr. Summers represents the snow of the ground at 8 o'clock in the evening of each of those days? A. Yes; the average depth. [811]

Q. It doesn't represent the snowfall?

A. No, sir.

Q. The snowfall from your records shows in the data introduced by Mr. Hellenthal, I believe?

A. Well, for some of those dates. I don't know whether those dates coincide in every particular with these but I know they were given for some of them.

Q. Now, will you also state from your records the amount of the precipitation, that is, including rain

(Testimony of M. B. Summers.)

and melted snow, from and including January 2d to and including January 8th, 1920?

The COURT.—Let me ask you, so as to get your theory, what relevancy has the precipitation after the slide—

Mr. RUSTGARD.—The relevancy comes in here. They introduced a number of pictures taken on the 7th and introduced evidence showing that that is the way it looked on the 2d of January; and we want to show that the rainfall up to and including the 7th of January was such that when those pictures were taken the situation would look entirely different from the way it looked on the 2d. They showed the pictures of January 7th for the purpose of showing how the water must have come down on the 2d, and I want to show now that on the 2d up to 11 o'clock the rainfall during the preceding 24 hours was only about half an inch— $66/100$ of an inch—while at the time the pictures were taken, during those 24 hours, the rainfall was $4\frac{1}{4}$ inches.

The COURT.—The object then is simply to impeach the pictures?

Mr. RUSTGARD.—Yes.

The COURT.—Very well.

A. The precipitation in the 24 hours ending at midnight of the 3d was $38/100$ of an inch; on the 4th, $14/100$ of an inch; on the 5th, $80/100$ of an inch; on the 6th, $2\frac{5}{100}$ of an inch; on the 7th, $4\frac{25}{100}$ inches; on the 8th, $25/100$ of an inch; and on the 9th, $3/100$ of an inch. [812]

Q. Now, will you also state from your record the

(Testimony of M. B. Summers.)

amount of the precipitation from September 21st to the 27th, 1918?

A. September 21st, none; 22d, trace, amount too small to measure; 23, 76/100 of an inch; 24th, 3/100 of an inch; 25th, 2 46/100 inches; 26th, 4 95/100 inches; 27th, 1/100 of an inch.

Q. Will you also give the maximum amount that fell in any 24 consecutive hours during the 25 and 26th of September, 1918?

A. It was 5 inches and 54/100 from 5:34 P. M. on the 25th to 5:34 P. M. on the 26th.

Q. Will you also give the maximum amount in any 24 hours in January, 1920?

A. Four inches and 25/100 from midnight to midnight of the 7th. It so happened that that precipitation, the maximum amount, ended with the calendar day, midnight—just a peculiar coincidence.

Q. Will you state the amount of rainfall in the 24 hours ending at 11 A. M. January 2d, 1920?

A. January 2d, 1920, 66/100 of an inch in the 24 hours ending at 11 A. M.

Q. This statement which you have certified to here corresponds, I notice, with the figures you have read off to the Court and jury at the present time? A. It does.

Q. It was made by you and taken from your books? A. It has been, yes, sir.

Mr. RUSTGARD.—For the convenience of the Court and jury I now offer this certificate in evidence.

Mr. HELLENTHAL.—No objection.

(Testimony of M. B. Summers.)

(Whereupon said certificate was received in evidence and marked as Plaintiff's Exhibit "S" in the case of Koski vs. Alaska Juneau Gold Mining Company.)

Q. Now, will you turn to your books and state what was the [813] rainfall during the 24 hours ending at 3 o'clock in the afternoon of January 7, 1920?

A. Four inches and 9/100 in the 24 hours ending 3 P. M. of the 7th of January.

Q. Mr. Summers, referring to your certified statement marked in the records as Defendant's Exhibit No. 14, I ask you to state whether or not the figures giving the precipitation include both the rainfall and the melting snow during the period mentioned?

A. They do; in every instance where the term precipitation is used in weather records it always means rain and melted snow—this is, if there was any snow.

Mr. RUSTGARD.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That means, Mr. Summers, melted snow at the point where the gage is? A. Yes, sir.

Q. At the gage point? A. Yes, sir.

Q. And has no reference to snow that might lie on the hills? Upon that subject you have no information?

A. Well, the depth of snow on the ground would be covered by that in a general way.

Q. In a general way? A. Yes, sir.

(Testimony of M. B. Summers.)

Q. But as far as the precipitation records show, they simply show the amount of melted snow at the point of the gage? A. Yes.

Q. And according to your records there was no snow on the ground on the 1st and 2d of Jaunary?

A. No.

Q. By that you mean to say that there was no snow at the gage? [814]

A. No, around the gage—in the immediate vicinity. We make our snowfall measurements in the immediate vicinity of the office,—the lot over here and the lot in front of the office. We aim to get the depth in the immediate vicinity. We do not, however get the amount of snow on the mountain-sides.

Q. You have to estimate those things, don't you, Mr. Summers?

A. They have to be estimated when they get down to a trace.

Q. You have to estimate them, don't you—you don't know what was on the mountain-side?

A. No, we don't take cognizance of the amount of snow on the mountain-sides. That would be an impossibility, because in the gullies there is snow in the summer. In slopes that are on a level the snow is gone very much earlier.

Q. Your records there with reference to the snow that lies on the ground are taken within the vicinity of the gage?

A. Yes, sir; within a few blocks.

Q. And where your records show that there was

(Testimony of M. B. Summers.)

no snow on the ground, then there would be no melting snow water calculated in your precipitation?

A. Necessarily so, Mr. Hellenthal, because you could have, say 2 inches of snow in the morning and that would melt by 8 P. M. Our measurements of snow on the ground are made at 8 P. M. only, and if you had 2 inches of snow at 8 o'clock in the morning and that melted before 8 P. M. and didn't show on the ground, but yet there was snowfall on the ground that day—

Q. How much was there on the 31st of December at 8 P. M.? A. Four $\frac{3}{10}$ inches.

Q. That had melted away by 8 P. M. on January 1st?

A. Yes; there was $6\frac{9}{10}$ inches that fell during the 24 hours ending at 8 P. M. of the 31st, but it melted down to $4\frac{3}{10}$ by 8 P. M.

Q. Now, referring to your records, there was a snowfall on the 30th of $1\frac{4}{10}$ inches? A. Yes. [815]

Q. And on the 31st a snowfall of $6\frac{9}{10}$ inches?

A. Yes, sir.

Q. That would be a snowfall of 9 inches?

A. Eight $\frac{3}{10}$ inches.

Q. Yes, that is right, $8\frac{3}{10}$ inches all told?

A. Yes.

Q. And according to your records that had melted down to nothing by 11 o'clock on January 2d?

A. I don't know about 11 o'clock.

(Testimony of M. B. Summers.)

Q. Well, by 8 o'clock January 1st it had melted down to nothing?

A. By 8 P. M. of January 1st, yes, sir.

Q. That snow had gone?

A. That snow had gone.

Q. And by saying it had gone it means it had melted?

A. It had melted by the rain and high temperatures.

Q. And your records would not indicate that there were not patches of snow left on the hillsides?

A. No, they would not.

Q. Referring to Plaintiff's Exhibit "R," those patches that show on that hillside as they are there would not be calculated in your records?

A. They might and they might not, Mr. Hellenthal, because, as I said, we take no cognizance in our records of the condition of snow on the hillsides. If this snow that you find on the hillside in this particular picture occurred say just a short time before 8 P. M. on a certain day and there had been no snow on the ground previous, the chances are that the amount shown in this picture here would be about the same as we would measure on the level here in town if it hadn't had an opportunity to melt in the rain,—I don't know when this picture was taken.

Q. This was supposed to have been taken on January 2d, 1920. What I am referring to is to show that your records do not refer to that particular condition? [816] A. No.

(Testimony of M. B. Summers.)

Q. That is what I am trying to get at; and there was no snowfall on the 1st or 2d?

A. No, sir; no snowfall nor none on the ground.

Q. So that whatever snow there is in that picture, if it was still in existence on the 2d, is a holdover of what fell on the 30th and 31st?

A. Well, it would depend on when it was taken. When was it supposed to have been taken?

Q. January 2d. Whatever snow there was on the hillside at that time was a holdover from that time, anyhow?

A. Yes; as I said in my testimony, there was an inch and 1/10 on the 4th, and an inch and 8/10 on the 5th.

Q. Yes, that was afterwards? A. Yes.

Q. After the 2d you got no snow again—

A. Until the 4th and 5th.

Q. Now, referring to the 7th, do you know what the weather was in the morning or forenoon of the 7th?

A. Yes, it was raining rather heavily.

Q. Rained rather heavily in the forenoon?

A. Yes; I can give you the hours and the amounts if you wish.

Q. All I want is, it rained rather heavily all that day, Mr. Summers, you would say? A. Yes.

Q. In the forenoon of the 2d did it rain heavily—fairly so? A. Just a moderate rain.

Q. A constant continuous rain during the day?

A. Yes, it was continuous.

(Testimony of M. B. Summers.)

Q. The rain fell just gradually throughout the period?

A. It was what might be called a little heavier than a normal Juneau rainfall.

Q. It was heavier than a normal Juneau rainfall, and it was continuous throughout the forenoon?
[817]

A. Continuous—the maximum amount in any one hour was .10 inch at the hour ending at noon on the 2d.

Q. What time on the 5th did the snow fall, Mr. Summers?

A. It began in the early morning and ended at 9:50 A. M., and then there was rain and snow mixed; in the forenoon, the temperature above freezing—the temperature around 36.

Q. About 9 o'clock in the morning it quit snowing and went to raining, is that the idea?

A. Yes, sir; the snow ended at 9:50 A. M., and then rain began at 10:10 A. M., and at 1:43 P. M. it was rain and snow mixed; that continued until 5:40, and then it turned to rain again.

Q. On the 1st, Mr. Summers, the day before the 2d, was the rain continuous during the day?

A. Yes; but it became very light at 4 P. M.; after 4 P. M. there was only .02 of an inch up to midnight,—from 4 P. M. it was only .02 of an inch.

Q. But it was continuous throughout the period?

A. Yes.

Q. Rained all the time?

A. We would take no account of intervals of 15

(Testimony of M. B. Summers.)

minutes. A cessation of 15 minutes we would not take any cognizance of.

Q. It is what you would call a steady rain?

A. Yes.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. RUSTGARD.)

Q. And the entire amount from 11 o'clock of the 1st to 11 o'clock of the 2d was .66 inch?

A. Yes, sir.

Q. Now, let me ask you in regard to snow, in determining whether there is snow on the ground you take into consideration the appearance of the Government lot? [818]

A. Yes, that lot and other lots around—the lot immediately in front of our place, Behrend's lot there.

Mr. RUSTGARD.—That is all.

(Witness excused.)

Mr. RODEN.—I will ask that the certificate marked exhibit "S" in the former trial be introduced in this case.

Mr. HELLENTHAL.—All right.

(Whereupon said certificate was received in evidence and marked Plaintiff's Exhibit "P.")

Mr. HELLENTHAL.—With that we will close our case except that I wish to make the request that the jury be taken up to view the premises—to see the hillside above where the slide took place, and where the water is supposed to have come from, the hog-

back and the ridges, and the situation up on the ground; and in that connection I wish to say that we will supply the Court and jury with a tram to go up there, as we did on a former occasion. Let it be understood that we are not doing that in any way to make the Court and jury our guests, but simply to take them up there to see the premises. The matter of costs does not amount to anything—we are just doing it as part of the presentation of the case, without any obligations attached to it.

The COURT.—The statute says that the Court shall point out certain things to the jury or that the Court shall appoint some one to do it.

Mr. HELLENTHAL.—I would suggest that Mr. Dudley, who is a surveyor connected with the plaintiff in the case, and Mr. Hargraves go up with the jury, with the understanding that they do not discuss the case but that they merely point out things on the ground.

Mr. RODEN.—There is nothing to be seen up there now as it was on the 2d day of January, 1920—cannot find even the location [819] of the penstock any more.

Mr. HELLENTHAL.—I think I can put Mr. Bradley on the stand and he can tell just where the penstock stood so that they can find it. I would like very much to have the jury see the place—what can be seen of it.

The COURT.—I think the jury ought to go and see the place myself, and I think they should understand wherein the appearance differs now from

what it did then—that is to say, they should be told where the penstock was—that should be definitely fixed, about where the penstock was,—I think they should see the slide itself; I think they should see the portal and the gullies and the hog-back and the snowshed. I do not think I will let them go, however, except that the Court, the counsel on each side and the stenographer go along.

Mr. RODEN.—Now, may it please the Court, what amount the gully that was up there about 15 months ago? What evidence would there be up there of that now—the gully that was cut down, as we claim—the gully below the penstock. They can see that from the street—they can see just as much from the street as they can see by climbing up the sidehill.

The COURT.—I do not want to try this case over again, gentlemen; I do not want to leave out anything that would make a jury come to a conclusion one way or the other, and in a case of this kind it seems to me that a view of the premises is proper. I think, however, if there is no objection, that I will ask you gentlemen to vacate the courtroom—I want to say something to the jury myself. If there is any objection make it known.

Mr. HELLENTHAL.—You mean any objection to the Court talking to the jury?

The COURT.—Yes.

Mr. HELLENTHAL. — None whatever, your Honor.

Mr. RODEN.—There is one more statement I

want to make to the [820] Court—as far as seeing that hill is concerned, the hill has been dynamited down since that time—the whole situation has been changed, I am informed.

The COURT.—You mean since the last trial?

Mr. RODEN.—No, since the slide occurred on January 2d.

Mr. HELLENTHAL.—The jury can judge for themselves.

The COURT.—Are you speaking of something that you know, or is it just rumor?

Mr. RODEN.—As near as I know—I heard blasting myself, and it isn't the same. If conditions were the same now as they existed then it would be all right.

The COURT.—Of course the jury must understand; if the conditions are not the same now they must know wherein they differ.

Mr. RODEN.—We will produce the witness who says that the whole side of the hill has been dynamited down.

The COURT.—Let me know who told you.

Mr. RODEN.—Now?

The COURT.—No. Step outside now.

(Whereupon all persons in the courtroom, except the Court, the jury and the stenographer, retired from the courtroom.)

The COURT.—What I want to know, gentlemen of the jury, is whether or not you, or any of you, think that it would elucidate matters—give you a better impression of how things were there, and

enable you with more certainty to come to a verdict in the case one way or the other, if you go down and look over the ground?

Mr. HARLAND.—You want an expression of our opinion?

The COURT.—Yes, if you will be careful not to intimate one way or the other what your opinion is on the merits of the case. All I want is your opinion about going down there.

Mr. HARLAND.—Of course, for my part, I have been up there at different times taking a walk, and I have a knowledge, I think, of how the buildings were there from walking past—just a general knowledge of how they were situated there before.
[821]

The COURT.—The question I asked is whether or not you think that by going down there now and looking over the ground it would assist you in coming to a verdict?

Mr. HARLAND.—No, not in my case.

Mr. VUKOVICH.—I think the same thing.

Mr. KARSTEN.—It is mostly about the slide and things have changed around there and it wouldn't be the same. I don't think it would have any bearing at all.

Mr. KRUGNESS.—It might help a little—I never was up there in my life—I never was up above the Koski house in my life.

Mr. MORRIS.—I don't know one way or the other.

Mr. BROITZMAN.—I am acquainted with the

situation up there—I worked for the company once upon a time, about 4 years ago.

Mr. SMITH.—I don't think it would make any difference.

Mr. COVE.—I don't think it would help any in my case.

Mr. FAGERSON.—I think we have had a very clear understanding from all the evidence for us to come to a conclusion.

Mr. WILSON.—Same here.

Mr. ELLENGEN.—It has been so long since the slide occurred I do not think it would be necessary for me.

Mr. KANE.—I don't think it would be necessary for me to go up.

The COURT.—I did not quite understand you, Mr. Karsten.

Mr. KARSTEN.—It has been so long since the slide occurred there wouldn't be any evidence—they have changed things around.

The COURT.—Well, I do not know that it would help you very much. If after you begin your deliberations you think it might help you to arrive at a verdict I may send you down as I did the other jury. I will not send you down now, however,—I may later.

(Whereupon counsel returned into court.)

Mr. HELLENTHAL.—We will rest, only we want the jury to go down and see the premises.

Defendant rests.

(Whereupon court adjourned until 10 A. M. the following morning.) [822]

MORNING SESSION.

April 2, 1921, 10 A. M.

REBUTTAL.

Testimony of M. B. Summers, for Plaintiff (in Rebuttal).

M. B. SUMMERS, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, in rebuttal:

Direct Examination.

(By Mr. RODEN.)

Q. (Mr. SUMMERS.) I wish you would state the official position you occupy.

A. I am in charge of the local office of the weather bureau.

Q. As such have you in your possession the records that have been kept by the bureau since it was established here in the town of Juneau?

A. Yes, sir.

Q. When was that, Mr. Summers?

A. The regular station was established on the 1st of January, 1917.

Q. Have you also any records in your possession that were kept concerning the precipitation in the town of Juneau prior to that time?

A. We have the monthly values, yes, and certain of the daily values.

Q. By whom were they kept, Mr. Summers?

A. Various persons—Mr. McLean, Mr. Reed, Mr. Sharick and I forget some of the others.

(Testimony of M. B. Summers.)

Q. From those records, Mr. Summers, can you tell on which day the high precipitation took place in the town of Juneau?

A. Only for certain parts of them. The records kept by Mr. Sharick are not complete as to daily amounts. We cannot give the greatest amount in 24 hours during the period that he kept the records, but we can from most of the other records prior to the time the weather bureau was established. [823]

Q. Now, I wish you would take your records and tell us when the highest precipitation in January was that you have any record of.

A. The highest was in 1918—September 25th and 26th.

Q. What was the precipitation?

A. 5 inches and 54/100.

Q. That was on September 26, 1918?

A. 25th and 26th.

Q. The 25th and the 26th, yes. When was the second highest precipitation?

A. In January, 1920, on the 7th.

Q. On the 7th day of January, 1920?

A. 4 inches and 25/100.

Q. When was the next highest precipitation?

A. September 7, 1902.

Q. What was it? A. 4 inches.

Q. When was the next?

A. On August 21, 1891, 3 inches and 95/100.

Q. And when was the fifth?

A. That would be the fifth.

(Testimony of M. B. Summers.)

Q. Did you mention the fourth highest?

A. The first was 5.54; the second, 4.25; the third, 4 inches; the fourth—I beg your pardon, I overlooked that one—that was November 5th and 6th, 1918, 3.98; then the fifth was August 21, 1891, 3.95.

Q. So the highest precipitation your records show was on the 7th of January, 1920?

A. No, September 25th and 26th, 1918.

Q. That was the highest—I mean the second highest?
A. Yes, sir.

Q. The second highest was January 7, 1920?

A. Yes. I might state that these excessive precipitations do not include the record kept by Mr. Sharick. There may have [824] been some precipitation during that record that equalled some of these amounts—we have no way of telling.

Q. Now, on the 7th day of January, 1920, during what portion of the day was the highest precipitation?

A. The heaviest rainfall was from 5 o'clock in the morning to 3 in the afternoon.

Q. How much water fell during that time?

A. 2 inches and 15/100.

Q. I would like for you to look at your records for December 30th and 31st, 1919, and January 1st and January 2d, 1920—

Mr. HELLENTHAL.—I guess, your Honor, that Mr. Summers' complete record for those days is already before the Court and has been read in evidence.

(Testimony of M. B. Summers.)

Mr. RODEN.—I think it is in the record. All right.

Q. Was the rainfall during December 30th and 31st, 1919, and January 1st and 2d, 1920, extraordinary, Mr. Summers? A. No, it was not.

Q. Was the rainfall on January 7th, 1920, extraordinary? A. Yes.

Q. On January 2d, the period of time that ended at 11 o'clock on the morning of January 2d, extending 24 hours back, how much was the rainfall during that time? A. That was .66 of an inch.

Q. When was the rainfall the heaviest on the 2d, in the morning or late in the day?

A. It was heaviest from 11 A. M. to 6 P. M., during which period it averaged about .11 an hour.

Q. So it was from 11 o'clock in the morning until 6 o'clock in the afternoon of the 2d of January that the rainfall was the heaviest? A. Yes.

Mr. RODEN.—That is all. [825]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Summers, the quantity of run off that runs down the mountain-sides and the gulches does not depend upon rainfall alone, does it?

A. No; it would depend on melting snow and seepage that was already in the ground.

Q. If there was a lot of snow lying on the mountain-sides further up, that would melt and run down the gulches, and you cannot tell by the rainfall record what the run off would be at any given point, could you?

(Testimony of M. B. Summers.)

A. Not in a mountainous country, no.

Q. And that is the situation here, isn't it, Mr. Summers? These mountains are covered with snow long after the snow is gone from the Juneau streets?

A. Yes; there was no snow on the ground, however, on the dates in January, January 1st and 2d, in Juneau.

Q. But there was snow on the mountains, wasn't there?

A. Probably was—we don't have any record of that.

Q. There was snow on the level of the Alaska Juneau flume and all around there on the 2d of January? A. I couldn't say as to that.

Q. All you know is that some 8 inches of snow that had fallen on the 30th and 31st, along there, had melted by the morning of the 2d?

A. Yes, sir.

Q. In Juneau, on the streets?

A. Yes, sir, in Juneau.

Q. As to the conditions of the mountains, that is a different proposition upon which you have no record? A. Exactly.

Q. The weather was moderate on those days, wasn't it?

A. Yes; on the 1st and second it was above freezing throughout.

Q. And the rain was what you call a steady rain, wasn't it, Mr. Summers? [826]

A. Yes, a steady rain.

(Testimony of M. B. Summers.)

Q. And a little harder than the ordinary Juneau rain?

A. It was not an extraordinary rain, but nevertheless heavier than the ordinary rain we have in Juneau.

Q. And that was steady? A. Yes.

Q. And if that was falling on the melting snow on the mountain there would be a big run off?

A. Depend on the quantity of snow.

Q. Your records show that some 8 inches of snow melted on the streets of Juneau during the 1st and 2d; isn't that right? A. Yes, sir.

Q. And the snow wouldn't melt as rapidly on the mountains as it would on the street, would it?

A. No.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of William Layton, for Plaintiff (in Rebuttal).

WILLIAM LAYTON, called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, in rebuttal:

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. William Layton.

Q. Where do you live?

A. Lower Front Street.

Q. How long have you lived on lower Front Street? A. Since 1896.

(Testimony of William Layton.)

Q. Do you know the place above lower Front Street where a crack occurs in the ground at the present time? A. Yes—yes, sir.

Q. Whereabouts is that located in reference to your residence? [827]

A. Well, one part of it comes right down through my garden.

Q. When did you first notice that?

A. I should judge about a month ago.

Q. Where does this break commence, Mr. Layton?

A. Well, it seems to me it commences under the dump.

Q. Under which dump?

A. The big rock pile.

Q. Whose big rock pile?

A. The Alaska Juneau.

Q. How do you know it commences under the dump?

A. Well, I should judge by the formation of the break.

Q. Where did you see the break?

A. Coming from the rock pile, coming this way I should judge 100 or 125 feet, then turns down the hill about 100 feet.

Q. So it comes from under the rock pile?

A. Yes.

Q. And runs fairly parallel with the mountain?

A. Yes.

Q. For a hundred feet? A. Yes.

Q. And then comes down the hill and runs down another hundred feet? A. Yes, sir.

(Testimony of William Layton.)

Q. How is the ground there—is it pressed down?

A. Yes, I should judge that is the way it looks to me—dead weight—the biggest face showing is right at the pile.

Q. Right at the waste pile?

A. Right at the waste pile, yes; and by getting in certain positions there you can see recesses in the pile showing that it goes underneath. Before that was almost smooth, but now at this end you will find there are recesses in the rock pile.

Mr. RODEN.—That is all. [828]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. That crack started first a month ago?

A. Yes, about a month ago.

Q. The earth broke when it started?

A. I don't know—I couldn't say—I didn't take notice of it at that time, but what drew my attention to it first was the fence—I saw the fence was getting all out of shape.

Q. That fence behind your house?

A. Yes; and I thought somebody had broke the fence and I looked and see the 20-penny nails were being drawn.

Q. You have a bulkhead there? A. Yes.

Q. And it was on the bulkhead that you saw the strain?

A. No, there is no strain on the bulkhead—no, it hadn't reached that—it is above that.

Q. Where were the nails drawn that you are talking about?

(Testimony of William Layton.)

A. In the fence running up and down.

Q. The fence right behind your house?

A. Yes, running right up the hill.

Mr. HELLENTHAL.—That is all.

Q. (By Mr. RODEN.) That fence runs right up and down the hill?

A. Yes; that divides my lot from Roberts'.

Mr. RODEN.—That is all.

(Witness excused.) [829]

Testimony of L. S. Robe, for Plaintiff (Recalled in Rebuttal).

L. S. ROBE, recalled as a witness on behalf of the plaintiff, having previously been duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. RODEN.)

Q. Mr. Robe, have you examined the crack in the ground above lower Front Street in the town of Juneau? A. Yes, sir, I have.

Q. I wish you would explain to the Court and jury what you found there.

A. I found at the point of greatest displacement a vertical slip of about 3 feet and a lateral slip of about 16, possibly 18, inches.

Q. Where does that break commence with reference to the waste pile?

A. The southerly line of the break—

Mr. HELLENTHAL.—Your Honor, I don't care what he testifies about this, but I don't want to have

(Testimony of L. S. Robe.)

to into the matter of defending that waste pile at this time. If he wants to show what is the cause of the slide independently of that, all right.

The COURT.—The only question before me now is whether or not it is rebuttal. Did he see the break?

Mr. RODEN.—He has stated in his previous answer that he did.

The COURT.—That he saw it when it broke?

Mr. RODEN.—No, saw it yesterday.

The COURT.—What do you mean by, where does it commence. Where one end is and where the other end is?

Mr. RODEN.—Where it begins.

The COURT.—Do you mean where it commences to break or where it begins with reference to the surface of the ground?

Mr. RODEN.—With reference to the surface of the ground.

The COURT.—He may describe it because the other side described it. [830]

The WITNESS.—The first visible point of break is a point about 35 feet back uphill from Layton's house, which point is about opposite the northerly end line of the lumber-yard; thence it describes a flat arc running in a general northwesterly direction a distance of about 175 feet following closely the toe of the slope; at the upper end of the said 175 feet it joins the point of main break, at which point it joins it at an angle, oh, of about I should say 75 degrees. This main break at this point

(Testimony of L. S. Robe.)

seems to run into the dump about 12 or 15 feet; thence continues in a northwesterly direction to a point about 8 feet to the east of the fence corner; thence through the fence line at an angle of about 75 degrees from the aforementioned line for a distance of 160 feet or thereabouts, a flat arc with a more or less irregular form to a point about 30 feet above the street level, at which point there is no more evidence of slide.

Q. I wish you would make a little sketch of this proposition, Mr. Robe, as you saw it and as you have described it to be now, and I wish you would explain the sketch in a few words.

A. This dotted line represents the toe of the slope of the dump.

Q. That is this edge of the dump?

A. The northern toe; this square is Layton's house; this point about 35 feet back of Layton's house is the point where the crack is first discernible—it is about 5 feet or less from the toe of the slope; thence it follows in a general northerly direction—or northwesterly direction, I should say, about 175 feet to that point there, immediately on the edge of the toe of the slope, or a few feet from it—maximum 5 feet distant; at this point it intersects the point of greatest break. Here, as I said before, the vertical slip is about 3 feet, the lateral slip is about 16 or 18 inches; it runs southerly into the dump from there 12 or 15 feet. [831]

Q. How can you determine that?

A. That is evident from the drop in the dump there

(Testimony of L. S. Robe.)

further than that we do not know. At a point about midway of this 175 feet aforescribed there seems to be another crack which runs in a southerly direction into the dump for a distance of approximately 125 feet and is visible on the surface of the fill or dump by a depression on the slope. This line here, the line of greatest crack, seems to cease at a change of formation. This is largely hardpan with some loose rock—very little material—while below that where the line of greatest weakness or break is shown—seems to be along the same line practically—appears to be a pocket or old fill. Along this point about 8 feet easterly from the corner of the fence the line zigzags in a more or less irregular way to the northwesterly about 160 feet. It can be plainly followed the whole distance. At the westernmost point of this line the break ceases at a point I should judge 30 or 35 feet uphill from *his* bulkhead, which shows no displacement.

Q. As I understand the diagram, from here on the break runs down the hill?

A. Almost at right angles with the hill.

Q. What, in your opinion, caused that break, Mr. Robe?

Mr. HELLENTHAL.—We object to that, your Honor; going to try another lawsuit?

The COURT.—I think myself, Mr. Roden, that we cannot try the cause of that slide.

Mr. RODEN.—No, but who brought it in here, your Honor?

(Testimony of L. S. Robe.)

Mr. HELLENTHAL.—Your Honor, the testimony adduced with reference to this coming slide was to show the progressive slide movement of the earth when it breaks—that is all that it was introduced for.

The COURT.—That is what I understood it was introduced for—to show that a slide is not a sudden thing. [832]

Mr. RODEN.—There is no slide in this case—there is an absolute breaking down by mere weight on top—by the weight of the dump. It isn't a question of slide—it is a question of breaking.

The COURT.—If that is so it certainly has nothing *to with* the case.

Mr. RODEN.—No, it has nothing to do with the case but they brought it here to show that that slide down there happened the same way as this one that we complain of here, and I want to show the situation is entirely different.

The COURT.—I will say to you the same as I said to the other side, go ahead but make it short.

Q. What in your opinion caused the slide?

A. The dead weight of the material.

Q. The dead weight of the rock pile?

A. Yes, sir.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Your opinion is that the rock pile lying behind the crack caused the mass in front of the crack to move; is that right?

(Testimony of L. S. Robe.)

A. Simply follows the line of weakness—

Q. Answer my question, please.

A. And the crack extends into the dump—how far it is impossible to know. It is caused by the dead weight of the material, though.

Q. Your opinion is that the mass in front of the crack moved because there was weight behind the crack; is that right?

A. The lead weight there moved it.

Q. The weight behind the crack caused the mass in front of the crack to break; is that right?

A. The dead weight, sure.

Q. Yes, that is the dead weight. And you are the same Robe [833] that was worrying about the man stealing the key out of the mill superintendent's pocket a little while ago?

A. I think that came up in the court.

Mr. HELLENTHAL.—That will be all.

(Witness excused.)

Plaintiff rests.

Mr. HELLENTHAL.—I have a motion that I would like to submit, your Honor.

(Whereupon the jury retired from the courtroom.)

Mr. HELLENTHAL.—Comes now the defendant and moves the Court to direct a verdict in favor of the defendant on the following grounds, to wit:

I.

That there is no evidence before the Court that the defendant was negligent in any respect whatsoever.

II.

That there is no evidence that the defendant was negligent in relation to any of the matters or things charged in the complaint or bill of particulars; but, on the contrary, the evidence shows that the defendant at all times referred to in the complaint and pleadings herein was in the exercise of the highest degree of care.

III.

That the evidence conclusively shows that water coming from the defendant's penstock or other part of the defendant's flume or diverting works was not the proximate cause of the injury complained of, or the resulting damage; that the evidence conclusively shows that said water could not have flowed in the direction of the slide area, but for the intervention of an independent, intervening cause; that there is [834] no evidence that the defendant was responsible for any obstruction to the natural drainage along which water would have drained to Portal Gulch, had it not been for such obstruction, whatever it might have been; that the evidence conclusively shows that waters coming from the penstock, if any, would have drained to Portal Gulch and not to the slide area, had it not been for some obstruction; and that there is no evidence of what such obstruction consisted, and especially no evidence that the defendant was responsible for its existence, whatever it may have been; or that it was such that the defendant should have anticipated or provided against. Furthermore the evidence conclusively shows that if it had not been for the exist-

ence of the trail leading down the ridge in the direction of the slide area the water would have left the ridge and drained in the direction of one or the other of the two gulches that exist on either side of the ridge; and that there is no evidence that the defendant was responsible for the existence of said trail or for the fact that said trail carried water, instead of permitting the same to follow the line of natural drainage.

IV.

That there is no evidence of damage sufficient to enable the jury to find a verdict in favor of the plaintiff, or to assess the plaintiff's damages, if any, or to base a verdict for damages upon.

V.

That there is no evidence of any of the matters or things charged in the complaint sufficient for the jury to find a verdict in favor of the plaintiff.

The COURT.—The motion will be overruled.

Mr. HELLENTHAL.—Your Honor will allow us an exception?

The COURT.—Yes. [835]

Whereupon, the Court, the jury and counsel for the respective parties view the premises.

(Court adjourned until 10 A. M. the following morning.)

MORNING SESSION.

April 4, 1921, 10 A. M.

**Testimony of P. R. Bradley, for Defendant
(Recalled in Rebuttal).**

P. R. BRADLEY, recalled to the stand, having previously been duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Bradley, will you tell in a short way what changes have been made on the ground so that the jury will appreciate the situation, and how the configuration of the ground differs now from what it did before the penstock was moved?

A. Before the penstock was moved the trail wasn't cut so far back into the hill,—when we cut that trail further into the hill in order to put the pipe-line further back we made more of an excavation there and we did more or less rock work and blasted out a cut to put in this pipe-line, and all this soil and muck was thrown straight out, which was the easiest way to get rid of it.

Q. That point where the penstock spout was, is that evident upon the ground?

A. It is evident to a person who knew it before.

Q. By what?

A. There are two things which fix the position of the penstock; one is the line of the pipe-line that comes up the hill—the penstock was originally at the head of the pipe-line, and the center line of that pipe-line as it goes up the hill would be practically the center line of the penstock as it originally stood.

(Testimony of P. R. Bradley.)

Q. The pipe-line entered the penstock at the southerly side? A. At the lower end.

Q. And the penstock would stand to the north of where the pipe-line [836] now is?

A. It would stand on the uphill side. In addition to that line, the line of the flume that came from the tunnel to the penstock is still apparent because the legs of the trestle work are still there, and if anyone goes there now they can get the line of the pipe coming into the center of the front of the penstock, and they can get the line of the flume coming into the side of the penstock, and one can very closely approximate from those two things the position of the penstock as it originally stood.

Q. The dirt that was loosened by putting in the new pipe and things of that kind ran down hill and covered up the ground?

A. Yes; and also the rubbish from the change house, the old flume and all that is lying there on the hillside.

Mr. HELLENTHAL.—Does the Court or jury wish to ask Mr. Bradley any questions about the situation?

Mr. RODEN.—No questions.

Mr. HELLENTHAL.—That is all, then.

The COURT.—I understand that the testimony is now closed, on both sides.

Mr. HELLENTHAL.—Yes, your Honor; and the motion I made yesterday will be renewed, so that it will be made at the close of the testimony. It is the same motion.

Whereupon a motion to direct a verdict in words and figures identical with the motion to direct a verdict hereinbefore set up at length was submitted to the Court, and the Court having overruled the same, the defendant duly excepted to such ruling and order of the Court, which exception was then and there allowed. [837]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Certificate of Stenographer.

I hereby certify that I am the official reporter for the U. S. District Court, First Division of Alaska; that I reported the testimony given at the trial of the above-entitled cause, and that the foregoing is a full, true and correct transcript of all evidence given and proceedings had at said trial.

Dated this 19th day of October, 1921.

L. A. GREEN. [838]

Whereupon the defendant requested the Court in writing to give the following instructions:

INSTRUCTION No. I.

Gentlemen of the jury, I instruct you that under

the law and the evidence in this case you must return a verdict in favor of the defendant.

INSTRUCTION No. II.

I instruct you, gentlemen of the jury, that if you should find it to be a fact that the slide which occurred on January 2d, 1920, and which forms the basis of this controversy, was caused by water which escaped from the penstock of the defendant, that that fact alone would not make the defendant liable to the plaintiff in this case. The defendant had a perfect legal right to divert the waters of Gold Creek and convey the same to its milling plant, and had the right to use flumes, penstocks and other similar devices designed for, and used in connection with, the diversion and conveyance of water, and in doing this, it was only required to exercise the degree of care that an ordinarily prudent person would exercise under similar circumstances. That is to say, in the selection, installation and maintenance of the devices employed, the law required the defendant to exercise the degree of care that an ordinarily prudent person would exercise under like circumstances, and no more.

Before the defendant can be held liable, it must have been guilty of a degree of negligence that results from the failure to exercise the degree of care I have just referred to. In this connection I instruct you that the defendant cannot be held liable for slight negligence, should you find that it had been slightly negligent in connection with the selection, installation or maintenance of its penstock or other devices connected with its flume, pipe-line or

diverting works. Slight negligence which results from the failure to exercise the highest degree of care, would not be sufficient to render the defendant liable to the [839] plaintiff in this case. Before it can be held liable it must be guilty of that degree of negligence which results from the failure to exercise the care that an ordinarily prudent man would exercise under similar circumstances. If the defendant exercised this degree of care, it did all that the law required of it, and if you find that it did so act, it will not be liable to the plaintiff in damages, even though you should further find it to be a fact that the plaintiff was injured and suffered damage because of the acts of the defendant.

INSTRUCTION No. III.

I instruct you, gentlemen of the jury, that if you find from the evidence in this case under my instructions, that Peter Koski or any of his predecessors in interest, made an excavation on the premises occupied by the Koski house referred to in the pleadings herein, and if you find that this excavation occasioned or caused the slide referred to in the complaint, the defendant cannot be held liable, even though you should also find that water escaped from the defendant's penstock. Before you can find for the plaintiff in this case, you must find that the excavation above referred to did not cause or occasion the slide.

INSTRUCTION No. IV.

I instruct you, gentlemen of the jury, that where the injury has resulted because of an occurrence of several acts or conditions, one of which is a wrong-

ful act or omission of a third party, and thus the injury results but would not have been produced but for such wrongful act or omission, then said act or omission is the proximate cause of the injury.

INSTRUCTION No. V.

I instruct you, gentlemen of the jury, that, before you can hold the defendant in this case liable, a wrongful act or omission on the part of the defendant as the same has been defined in [840] these instructions must have been the proximate cause of the injury complained of. And in this connection I instruct you that if you should find from the evidence in this case that the injury has resulted from the concurrence of two or more acts or conditions, one of which is a wrongful act or omission on the part of the third party as defined in these instructions, should you find that the third party was guilty of such wrongful act or omission and that the injury resulted because of the concurrence of such two or more causes, you cannot hold the defendant liable unless you further find from the evidence that the injury which resulted from such concurrent acts or conditions would not have been produced had it not been for the wrongful act or omissions of the defendant.

INSTRUCTION No. VI.

I instruct you, gentlemen of the jury, that if, under the facts in this case, you find that the cut in the bank to which the witnesses have testified as having been made at the point where the Koski house formerly stood, was the cause which, together with other natural causes, helped to produce the

landslide which is the subject of inquiry, then I instruct you, gentlemen of the jury, that the plaintiff in this case cannot recover.

INSTRUCTION No. VII.

I instruct you, gentlemen of the jury, that if you find that water did escape from the penstock of the defendant and that such water found its way to the slide area and was the proximate cause of the slide, as I have defined the term proximate cause in these instructions, you cannot find a verdict for the plaintiff.

If you also find that such water would not have reached the slide area and would not have caused the slide, had it not been for the existence of the trail leading down the mountain-side, to the existence of which the witnesses have testified; if you find that the natural drainage on the hillside was in the direction of Portal Gulch and that the water would have flowed there had [841] it not been for the act or acts other than the defendant's, or for any cause or causes over which the defendant had no control, then the defendant cannot be charged with negligence because of water that did not flow along the line of natural drainage, or for damages resulting from such flow; if you find the conditions to be such as I have last indicated with reference to drainage and the flow of water, your verdict should be for the defendant.

Filed in the District Court, District of Alaska, First Division. April 3, 1921. J. W. Bell, Clerk.
By L. A. Green, Deputy.

Whereupon, after arguments by respective counsel, the Court instructed the jury as follows:

Instructions of Court to the Jury.

Gentlemen of the Jury:

This is an action brought by Isadore Goldstein for the recovery of compensation for damages alleged to have been sustained by him by reason of a slide which occurred in the city of Juneau on the second day of January, 1920. The plaintiff alleges that the slide was occasioned by water escaping from the ditch, flume or penstock of the defendant company and running down the slope of the hill. It is claimed that the said water so escaped and ran down the hill by and through the negligence of the defendant.

It is established that plaintiff was damaged by the slide of January 2, 1920.

It is the contention of plaintiff that water escaping from the ditch, flume or penstock of defendant was a proximate cause of the slide which did the damage; while defendant contends, 1st, that no water of any appreciable amount escaped from the flume or penstock prior to the slide; 2d, that even if any such water did escape, yet such water was not a proximate cause of the slide.

PROXIMATE CAUSE.

What is meant in law when one thing is said to be the cause of another? In one sense all things that go before are the causes of all things that come after, for all things that go before combine [842] in some degree, infinitesimal though it may be, to

produce the things that come after; but in law no such refinement can be indulged in for the law does not consider remote causes but only proximate causes, that is, near causes—near in point of potency—efficient causes. The law considers that to be a proximate cause which is an efficient cause—one that necessarily sets the other causes in operation. No event can be said to be the proximate cause of a subsequent event unless that subsequent event would not have happened if the particular event had not already happened.

So the first question that should present itself to you would be, did any water escape from the ditch, flume or penstock prior to the landslide? If you answer that in the affirmative, then you take up the question whether or not the escaping water was a proximate cause of the slide. In determining this question you should take into consideration what was the state of affairs existing at the time the water escaped, if it did escape; then consider how much water escaped, and where it flowed to, and what effect, if any, it had on the then existing state of affairs,—all as shown by the evidence, for you cannot go beyond the evidence. If the water escaping (provided any such did escape) before the slide was of small quantity or force, and so little affected the then existing state of affairs that the slide would have occurred even if the water had not escaped, then the escaping water, if any, was not a proximate cause of the slide. On the other hand, if you find from the evidence that the escaping water, if any, was of such amount and force and so

placed that acting upon the then existing state of affairs the slide was produced by its material assistance, and would not have happened but for that assistance, then the water was a proximate cause of the slide.

One thing may be a proximate cause and yet not the sole cause, for there may be more than one proximate cause. An occurrence may be the result of several happenings, each one [843] materially contributing to bring about that event, but when that is the case no one of those things is a proximate cause of the result unless that result would not have happened if that one supposed cause had not already happened.

In order to find that water flowing from the penstock, if any, was the cause of the slide it would not be necessary to go so far as to find such water alone and unaided by other forces caused the slide, but it would be necessary to find that the said water was one of the material agencies in producing the slide and that such slide would not have occurred unless the water escaping from the flume did flow over the area of the slide.

BURDEN OF PROOF TO SHOW PROXIMATE CAUSE.

The burden of proof to show that the escaping water, if you find that any water escaped before the slide, was a proximate cause of the slide, is on the plaintiff—that is to say, if the plaintiff would have you believe that this slide was caused by water escaping from the ditch, penstock or flume, he must produce (or rather there must have been produced

in the case) stronger, weightier, more convincing evidence that the water was a proximate cause than the defendant would have to produce that the water was not a proximate cause.

If you do not find from a preponderance of the evidence that water escaping from the ditch, flume or penstock was a proximate cause, you should find for the defendant irrespective of any other considerations.

I have been directing your attention solely to the question of proximate cause of the slide, for the cause of the slide must be determined before you would be in a position to say whether or not defendant was liable.

NEGLIGENCE.

I come now to the question of liability. If in your opinion the preponderance of the evidence shows that water escaping from the ditch, flume or penstock was a proximate cause of the slide [844] you should then determine whether or not the water was permitted to escape through the negligence of the defendant, for the gist of this action is negligence.

Now, the defendant company had a right to divert the waters of Gold Creek and bring them around the mountain and utilize them by means of flume, ditch, penstock and pipe-lines in the running of its mill. In doing this it is not an insurer against the infliction of damage. It is not liable for damages which may result from its so diverting the water if such work be done with ordinary care. While it has this right, however, to divert the waters of Gold

Creek by bringing them around the mountain, yet if in so doing it negligently permits water to escape and cause damage, it is liable for the damage caused thereby, if any.

The second question for you to consider, then, is this: Was the escape of the water, if any water escaped before the slide, due to the negligence of the company in any of the particulars alleged in the complaint?

Negligence is the absence of that degree of care which an ordinarily prudent person having due regard for the welfare, the safety and the rights of others would exercise under the circumstances of the particular case being inquired of. Now, the degree of care which an ordinarily prudent person would exercise in any given case is proportional to the dangers reasonably to be apprehended and guarded against in the light and in the view of all the circumstances and of the consequences if such dangers culminate in some untoward event.

In this case the particulars of negligence alleged by the plaintiff, and such particulars, or some of them at least, he must show by a preponderance of the evidence, are as follows, that is to say: Plaintiff alleges that "by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the distribution pipe [845] would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises in question,

or otherwise occasioned any damage." He further alleges "that ordinary and reasonable care and caution on the part of the defendant required of it that it should have constructed and maintained at all times such waste flume to carry away such waste water or surplus water, and that defendant was negligent in not providing such protection against injury from surplus or overflowing water at or near the penstock." Plaintiff further alleges that "defendant was negligent in that it failed to provide and maintain a series of spillways along its flume by which spillways surplus water could and would be released from the flume before it reached the penstock." He further alleges that the overflow water of which he complains and which he alleges caused the damage herein complained of "was known to the defendant to be so flowing and likely to cause said damage long prior" to the occurrence of the slide complained of, or would, by the exercise of reasonable care on the part of the defendant have been "known to it long prior to the said slide and prior to any damage that would have been done by the said water." He further alleges "that defendant was negligent in not shutting off said water and preventing said overflow before any damage was occasioned thereby," and that it "wrongfully and unlawfully permitted the said water to flow upon the said premises."

Now, it is for you to say, from the evidence in this case, what, if any, dangers would have been reasonably anticipated by the ordinarily prudent man as likely to arise; and then it is for you to de-

termine, also, what, if any, precautions an ordinarily prudent man would have taken under the circumstances to avert the dangers that could be reasonably anticipated, and then if there are any precautions which the ordinarily prudent man would have taken, it is for you to say whether or not the defendant did take such precautions. Defendant would be held to the duty of [846] taking such precautions as the ordinarily prudent man would take against the dangers which an ordinarily prudent man would anticipate as being likely to arise. It would not be held to the duty of taking any more precautions. If, for instance, an ordinarily prudent man under the circumstances would have deemed it a wise or necessary precaution, or one called for under the circumstances, to build a waste-pipe or conduit or spillway to catch any overflow water that might escape from the penstock or flume, then the defendant should have taken such precaution. If, on the other hand, an ordinarily prudent man would have considered that under the circumstances there was either no danger that the water would overflow at the penstock, or if so, that it would do any damage if it did overflow, then the defendant could not be held to liability for not building such waste-pipe, conduit or spillways.

In short, did the defendant in this regard do or omit to do anything which an ordinarily prudent person would not have done or omitted to do, as the case may be, under the circumstances? If the answer is in the affirmative, the defendant was negligent just insofar as it failed to live up to the

standard which an ordinarily prudent man would set for himself. If the answer is in the negative, the defendant was not negligent.

To state again, essentially negligence is not the absence of high care nor the presence of low care or of no care, but it is the absence of that care which an ordinarily prudent person would exercise under the circumstances. Under some circumstances an ordinarily prudent person would exercise a high degree of care, and under other circumstances he would not be so careful,—it is for you to say, from the evidence, what the circumstances were,—that is, what the conditions were, what the dangers to be apprehended were, what precautions were wise or necessary to be taken, and what care an ordinarily prudent person, bearing all these things in mind, would have taken, and whether or not the defendant exercised that amount of care.

Negligence is never presumed. It must be proven by a preponderance [847] of evidence, and it must also be proven by a preponderance of the evidence that the negligence proven, if any, was the cause of the disaster complained of in any given case—that is to say, plaintiff cannot recover on the score of negligence unless it appears from a preponderance of the evidence that at least one particular of the negligence complained of existed, and he will have to prove in addition to that that particular act of negligence was the proximate cause of the injury proven, if any.

CAUSES FOR WHICH DEFENDANT NOT RESPONSIBLE.

The fact, if it be a fact, that before the escape of the water Koski or his predecessors made an excavation in the bank or hill and that the slide would not have occurred but for that excavation, will not excuse the defendant if the escape of the water was a proximate cause, as I have defined approximate cause, and if that escape was due to the negligence of the defendant, as I have defined negligence, provided you find that the slide would not have been produced at all had it not been for the negligent act of the defendant.

Of course if the said cut in the bank, either alone or combined with natural causes over which the defendant had no control, produced the slide, the defendant would not be liable; but if the cut in the bank and natural causes, combined with the negligent act of the defendant in allowing water to escape from its penstock, if you find that any such water did escape, and that its escape was due to negligence—I say, if all these things combined produced the slide, and the slide would not have been produced except for the said negligent act, if you find it was a negligent act, then the defendant would be liable, and your verdict should be for plaintiff.

To make the matter a little plainer, gentlemen, where a cause produced by a negligent act of a defendant combines with causes for which the defendant is not responsible to produce a casualty, the law does not consider the negligent act as the

[848] proximate cause of the casualty unless it be true that the casualty would not have been produced except for that negligent act, and that an ordinarily prudent man under all the circumstances would have known or should have known that the casualty might result from that negligent act.

Applying that principle of law to this case, you are instructed that if you find that water escaped from the flume due to the negligence of the defendant and materially contributed to produce the slide, but that an excavation or excavations and the rains and snows and other conditions for which the defendant is not responsible, also contributed to produce the slide, you cannot find a verdict against the defendant unless you also find that the slide would not have been produced except for the escaping water and that an ordinarily prudent person would have known or should have known that the natural and probable consequences of the escape of the water would have been to produce a slide or like casualty.

You are the sole judges of the weight of the testimony and the credulity of the witnesses. You must decide the case on the evidence and the instructions of the Court, and not take into consideration any extraneous matters. You are to decide the case without fear or favor or sympathy. If the water was the cause of the slide and the defendant was negligent, it is but meet and proper that it should compensate the plaintiff for the damage inflicted. If water escaping from the defendant's flume or penstock was not the cause of the slide, or if the defendant was not negligent in the particulars

pointed out in the complaint, then it would be manifestly unjust to take money out of its pocket to compensate the plaintiff for damages which did not arise from its delinquency.

You make up your minds which witnesses are to be believed when they testify in court much the same as you do when they tell you a story outside of court—you size up the witness—you observe [849] his appearance and demeanor—you note whether he is frank and candid—whether he has shown a disposition to tell the truth and the whole truth about the matters to which he has testified; you consider how he stood cross-examination; you consider what interest he has in the story told and whether or not that interest has colored his testimony, and if so, to what extent; and from all the facts and circumstances appearing in the case make up your mind whom to believe and what to believe.

In this case expert testimony has been introduced on both sides. You should weigh the testimony of expert witnesses in the same manner as you weigh that of other witnesses,—that is to say, you are not bound to believe any expert unless his testimony seems reasonable under the circumstances. When matters beyond the ken of ordinary observation and experience—matters requiring special or technical knowledge arise, experts are called who are specially versed in those matters—they give their opinions for their reasons, and you weigh the whole matter. After all, it is what you believe that testimony is and what inferences you think ought to be drawn from it, that controls.

Arguments of counsel are not evidence. It is meet and proper that they should give their recollection of the evidence, and state the inferences which they think you should draw from that evidence, but, as said before, it is your recollection of the evidence and your judgment as to the inferences which are to govern your verdict.

If your verdict should be for the plaintiff *if* should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money. You have nothing to do with the costs in this case one way or the other.

If you find a verdict in this case, you will answer the following questions: [850]

- (1) Was water escaping from the ditch, flume or penstock a proximate cause of the slide?
- (2) Was the defendant negligent in any of the particulars set forth in the complaint?
- (3) If so, in what did that negligence consist?

Whereupon the defendant excepted to the instructions given by the Court as follows:

Mr. HELLENTHAL.—Note an exception on behalf of the defendant to the refusal of the Court to instruct as requested in Defendant's Requested Instructions Nos. 1, 2, 3, 4, 5, 6, and 7.

Defendant further excepts to the last part of the charge permitting the jury to assess damages, on the ground that there is no evidence under which the jury can assess damages, there being no evidence of market value, nor evidence of the extent of the

loss or damage, if any, sufficient for the jury to assess damages. Which exceptions were then and there allowed by the Court.

Whereupon the jury retired for deliberation, and thereafter, to wit, on the 5th day of April, 1921, returned into the court the following verdict:

“In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Verdict.

We, the jury empanelled and sworn in the above-entitled cause, find for the plaintiff, and assess the amount of his recovery at \$18,275.00.

G. FAGERSON,

Foreman.”

And on the said 5th day of April, 1921, the jury also returned [851] into court their special findings as follows, to wit:

“In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Special Findings of the Jury.

We, the jury in the above-entitled cause, answer the questions propounded to us as follows:

(1) Was water escaping from the ditch, flume or penstock a proximate cause of the slide?

Answer: Yes.

(2) Was the defendant negligent in any of the particulars set forth in the complaint.

Answer: Yes.

(3) If so, in what did that negligence consist?

Answer: Failure to provide waste flume to carry overflow water from penstock and trommel screen to place of safety.

G. FAGERSON,

Foreman.”

That thereupon and in the presence of the jury the defendant excepted to the verdict of the jury and to the answer to the special interrogatories propounded to the jury, for the reason that the said verdict and the said answers, and each of them, are

contrary to law, not supported by any evidence, and not supported by sufficient evidence; and exception allowed.

That thereafter, within the time allowed by law, to wit, on the 7th day of April, 1921, the defendant filed a motion for a new trial, as follows, to wit:
[852]

“In the District Court for the District of Alaska,
Division No. One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Motion for New Trial.

Comes now the defendant and moves the Court to set aside the verdict of the jury herein and for a new trial, on the following grounds, to wit:

I.

That the evidence is insufficient to justify the verdict.

II.

That the Court erred in denying defendant's motion to direct a verdict made at the close of the case, after the evidence on behalf of both sides had been adduced, submitted and closed; for the reasons stated in said motion, which is on file herein and to

which reference is hereby made and which said motion is to be considered as though set forth herein.

III.

That the Court erred in its instructions in so far as they related to the amount of damages that could be covered and in so far as they permitted the jury to assess damages; for the reasons stated in the exceptions taken at the time.

IV.

That the Court erred in not charging the jury as requested by the defendant in its several requested instructions, numbered I to VII, inclusively.

V.

For errors of law occurring at the trial, and excepted to by the defendant.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.” [853]

That thereafter, to wit, on the 25th day of August, 1921, the Court denied the defendant’s motion for a new trial as follows: [854]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Ruling on Motion for New Trial.

On this motion the principal contention is that the evidence as to the damage inflicted was not of such a nature as would permit the jury to found a verdict thereon. It must be confessed that the evidence is not very satisfactory on any particular item. This case was contested so vigorously on the question as to the cause of the slide and the liability therefor that the question of specific damages did not come in for a great deal of attention; and yet that particular of the case is as essential to be proven as any other particular. Our Circuit Court of Appeals has lately reversed a case for error arising in the submission to the jury of the question of damages when the evidence was indefinite and uncertain. (See *Boland vs. Ballaine*, 266 Fed. 22.)

So far as damages to the real estate are concerned, it may be said there was no evidence whatsoever of the value of the latter sufficient to allow a jury to predicate a verdict upon. No witness undertakes to say what it was worth before the slide and after the slide. Goldstein, in giving a list of his damages, refers to "three rows of cabins, \$3,000." Where those cabins were, what they were worth, how they were damaged, or whether they were totally destroyed, does not appear. He does not even estimate what it would cost to replace them. His sole reference is as above stated, "three rows of cabins, \$3,000." Manifestly this item should not have been submitted to the jury without more evidence [855]

As to the apartment house on the hill, Goldstein testifies that that cost him \$8,000, and that it was in active use and occupation up to the time of the slide; that it was totally destroyed by the slide, and he estimates that it would cost \$8,500 to replace it.

In fine, I think that as to the following items the evidence was sufficient to sustain a verdict for the following amounts, to wit:

Damage to the store building.....	\$ 1,500.00
Damage to the stock in the store and warehouse.....	2,500.00
Damage to the warehouse.....	1,400.00
House on the hill.....	8,500.00
Fixtures in the apartment house, as item- ized in testimony of Goldstein.....	1,725.00
Damage to the building on lot 2, block M.	1,000.00
<hr/>	
Total.....	\$16,625.00

The jury returned a verdict for \$18,275.00. There is no way of telling how much, if anything, they allowed for the "three rows of cabins, \$3,000," and as they could not legally allow anything for that item, the whole amount will have to be deducted from the amount of the verdict. This would leave the sum of \$15,275.00, to sustain which there has been, in my opinion, sufficient evidence introduced.

The verdict will be reduced to \$15,275.00 If within 30 days from this date the plaintiff elects to remit \$3,000 from the verdict returned and accept judgment for the remainder, the motion for a new trial will be denied; otherwise it will be granted.

ROBERT W. JENNINGS,
Judge.

To which ruling the defendant excepted, and the exception was allowed.

That thereafter, to wit, on the 2d day of September, 1921, plaintiff filed his acceptance of the reduction of said verdict as follows: [856]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Plaintiff's Acceptance of Reduction of Verdict.

Upon the hearing of defendant's motion for a new trial in the above-entitled and numbered cause, the Court having considered the matter of damages and after due consideration found that there was not sufficient testimony as to the loss or damage of three rows of cabins, in plaintiff's complaint alleged to have been destroyed and in said complaint alleged to be worth the sum of Three Thousand (\$3,000.00) Dollars, and the Court having, upon the 26th day of August 1921, rendered its decision upon the said motion for new trial that the same be denied upon the condition that the plaintiff consent, within thirty days therefrom, to the reduction of the verdict of the jury in the amount of Three

Thousand (\$3,000.00) Dollars, that is, from the sum of Eighteen Thousand Two Hundred Seventy-five (\$18,275.00) Dollars to the sum of Fifteen Thousand Two Hundred *Seventy-five* (\$15,275.00), *otherwise* the said motion to be granted:

The plaintiff, in compliance with the said ruling of the Court, now files his consent to the reduction of the verdict of the jury in the amount of Three Thousand (\$3,000.00) Dollars.

Dated at Juneau, Alaska, this 2d day of September, 1921.

RODEN & DAWES,
Attorneys for Plaintiff."

Copy received Sept. 2, 1921.

HELLENTHAL & HELLENTHAL.

That on said 2d day of September, 1921, the Court filed its order modifying the Court's opinion on motion for new trial, as follows: [857]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Modifying Court's Opinion on Motion for a
New Trial.**

WHEREAS, the Court in its opinion heretofore filed herein on the motion for a new trial used the following language:

“There is no way of telling how much, if anything, they allowed for the ‘three rows of cabins, \$3,000,’ and as they could not legally allow anything for that item, the whole amount will have to be deducted from the amount of the verdict. This would leave the sum of \$15,275, to sustain which there has been in my opinion sufficient evidence introduced”; and

WHEREAS, the Court in making said statements inadvertently overlooked the fact that among the items of damage claimed and as to which there was no sufficient evidence, is the item of \$1500 damages to real estate; and

WHEREAS, there was no evidence sufficient to go to the jury as to the amount of the damage to the real estate; and

WHEREAS, there is no way to ascertain how much the jury allowed for the said item “Damage to real estate”; and

WHEREAS, on that account the said verdict of the jury should suffer a further diminution of \$1500.00; and

NOW, THEREFORE, IT IS ORDERED that the said verdict of the jury should suffer a further diminution of \$1500.00, and that the said decision of the Court should be, and the same is, hereby amended to read as follows: [858]

“The verdict will be reduced to \$13,778.00. If within 30 days from this date the plaintiff elects to remit \$4,500.00 from the verdict returned and accept judgment for the remainder, the motion for a new trial will be denied; otherwise it will be granted.”

Dated at Juneau, Alaska, September 2, 1921.

ROBERT W. JENNINGS.

That thereafter, to wit, on September 6, 1921, the plaintiff filed his consent to the reduction in the verdict of the jury, as follows:

“In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Plaintiff's Consent to Reduction of Verdict.

Upon the hearing of defendant's motion for new trial in the above and numbered cause the Court having considered the matter of damages and after due consideration found that there was not sufficient evidence to submit to the jury as to the loss or damage of three rows of cabins, in plaintiff's complaint alleged to have been destroyed and in said complaint alleged to be worth the sum of \$3,000.00,

and the Court having, upon the 26th day of August, 1921, rendered its decision upon the same motion that the same be denied upon the condition that the plaintiff consent, within thirty days therefrom, to the reduction of the verdict of the jury in the amount of \$3,000, otherwise the said motion to be granted; [859]

And upon further consideration of the question the Court, on the 2d day of September, having revised its said order of the 26th day of August, 1921, to the effect of further reducing, for the same reasons, the said verdict in the further sum of \$1500.00 upon the question of damages to real estate alleged in said complaint to have been damaged to the said amount and overruling defendant's motion for new trial upon the condition that plaintiff, within thirty days therefrom, consent to the reduction of the verdict in the total sum \$4,500.00, that is, from \$18,275.00, to \$13,775.00, otherwise the said motion be granted.

The plaintiff, in compliance with the said ruling of the Court, now consents to the reduction of the verdict of the jury in the amount of Four Thousand Five Hundred (\$4,500.00) Dollars.

Dated at Juneau, Alaska, this 3d day of September, 1921.

RODEN & DAWES,
Attorneys for Plaintiff.

Received copy.

J. HELLENTHAL."

And thereupon on the 6th day of September, 1921, the Court entered its order denying the motion for a new trial as follows:

“In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

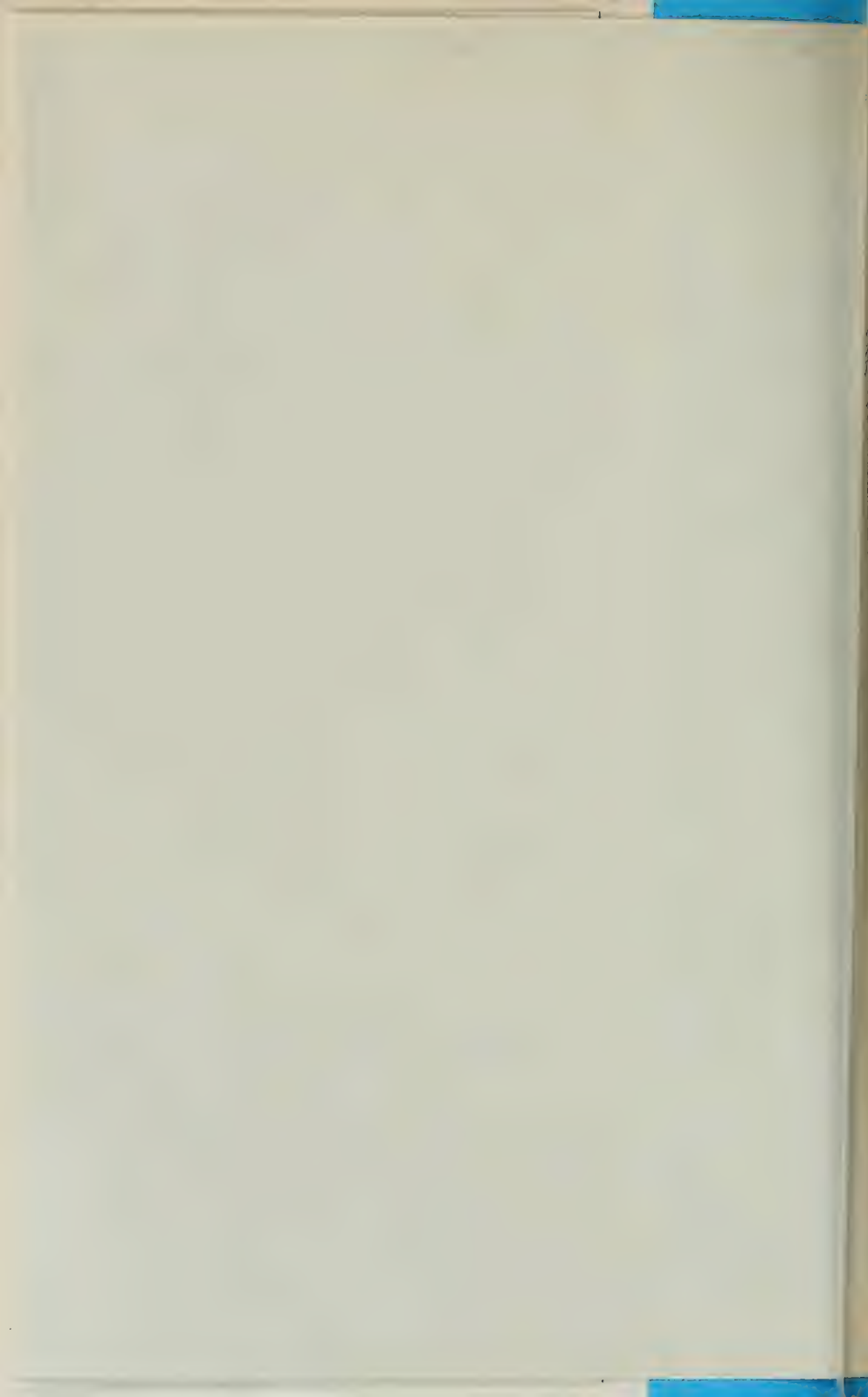
Defendant.

Order Denying Motion for New Trial.

This matter coming on on defendant's motion for a new trial, and the plaintiff having remitted the sum of Four Thousand Five Hundred Dollars (\$4500) from the verdict,

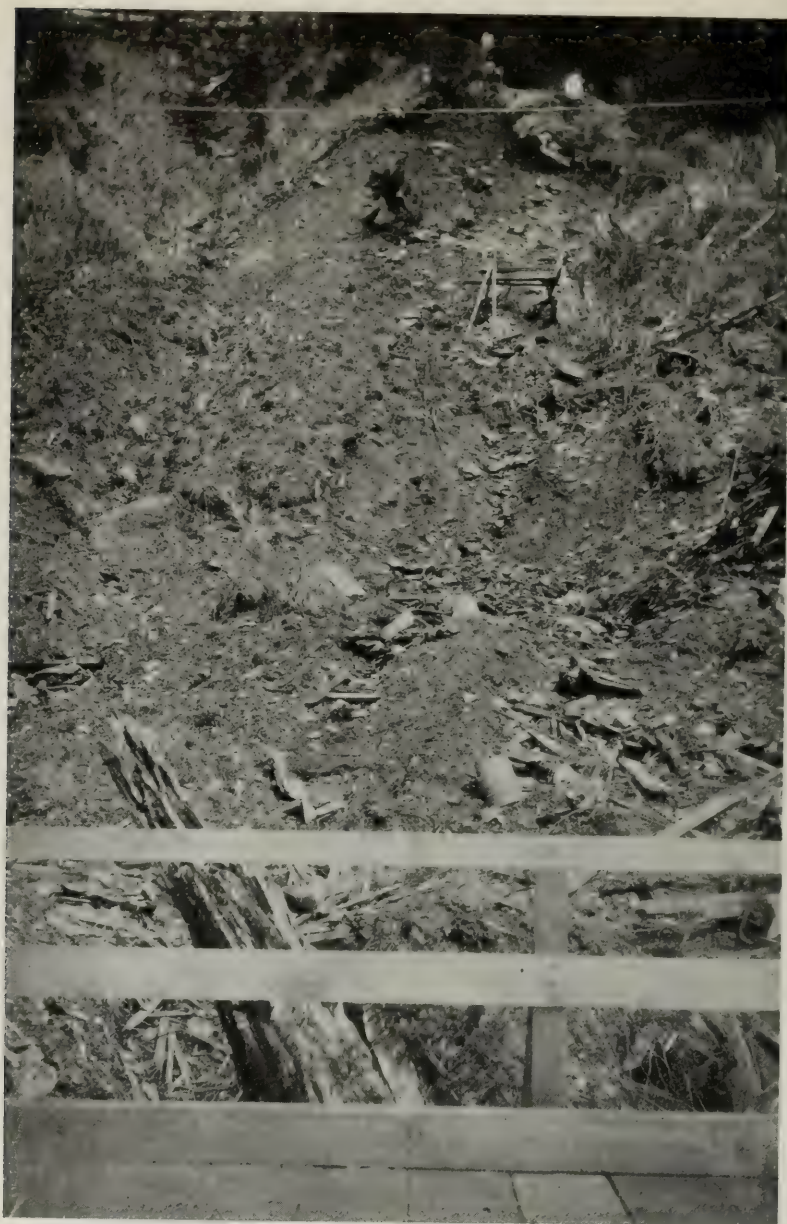
IT IS ORDERED that the motion for a new trial be denied and that judgment herein be entered in the sum of Thirteen [860] Thousand Seven Hundred and Seventy-five Dollars (\$13,775.00); to which ruling and order of the Court the defendant, by counsel, excepts, which exception is allowed by the Court.

ROBERT W. JENNINGS,
Judge. [861]



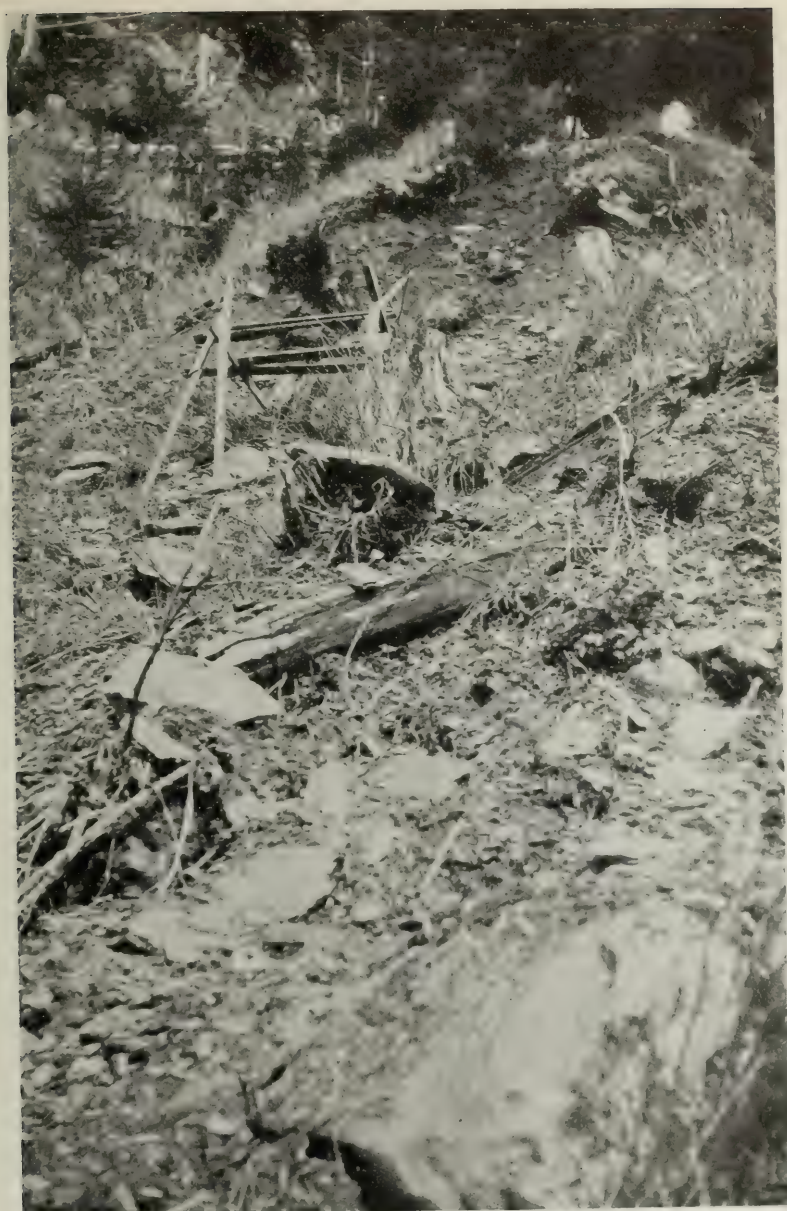
[Endorsed]: Plf's. Exhibit "A." Received in
Evidence Mar. 23, 1921, In Cause No. 1990—A.
J. W. Bell, Clerk. By L. O. Green, Deputy.
[862]

Plaintiff's Exhibit "B."



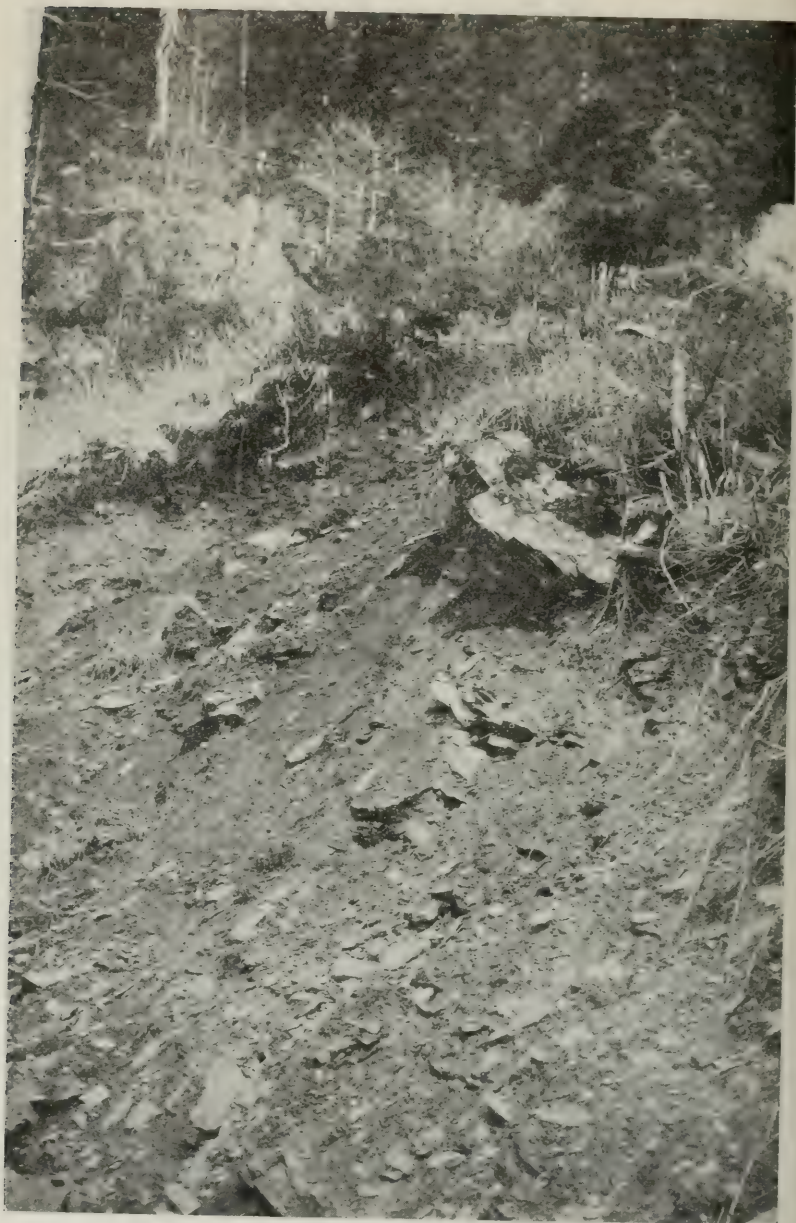
[Endorsed]: Plf's. Exhibit "B." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy. [863]

Plaintiff's Exhibit "C."



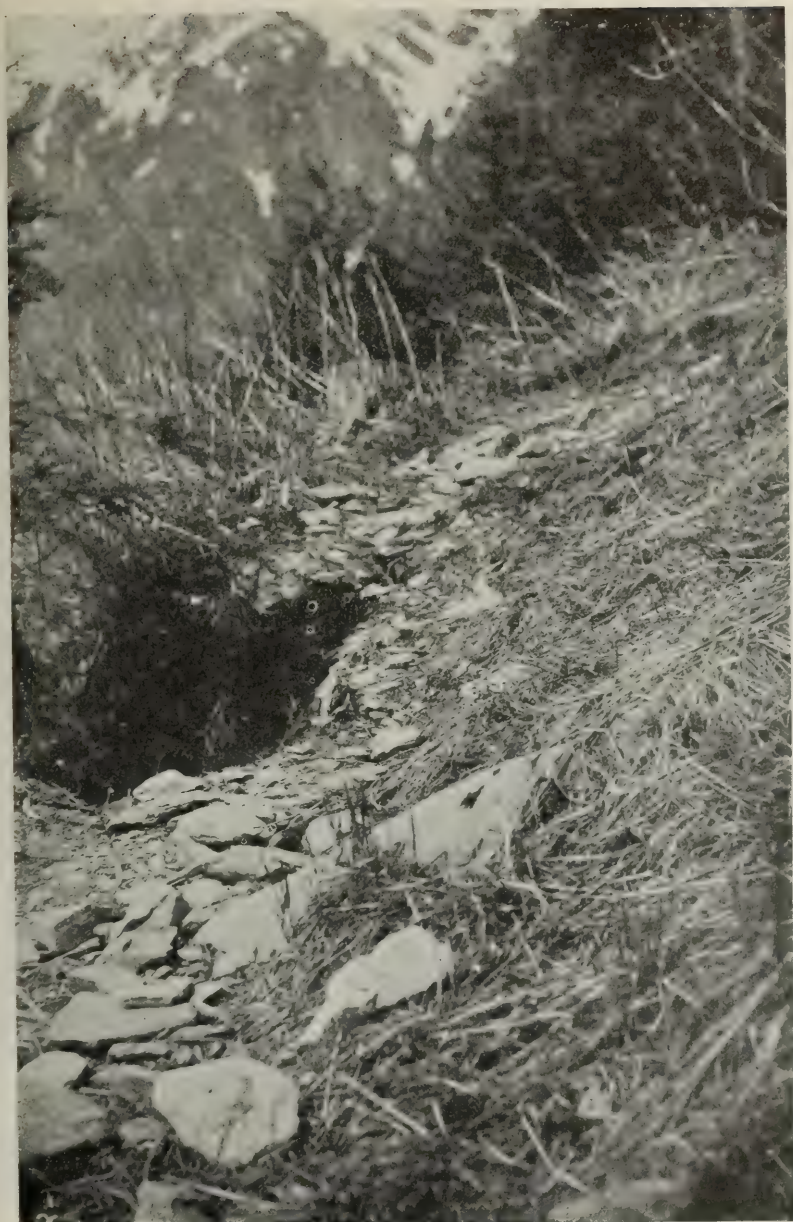
[Endorsed]: Plf's. Exhibit "C." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy. [863½]

Plaintiff's Exhibit "D."



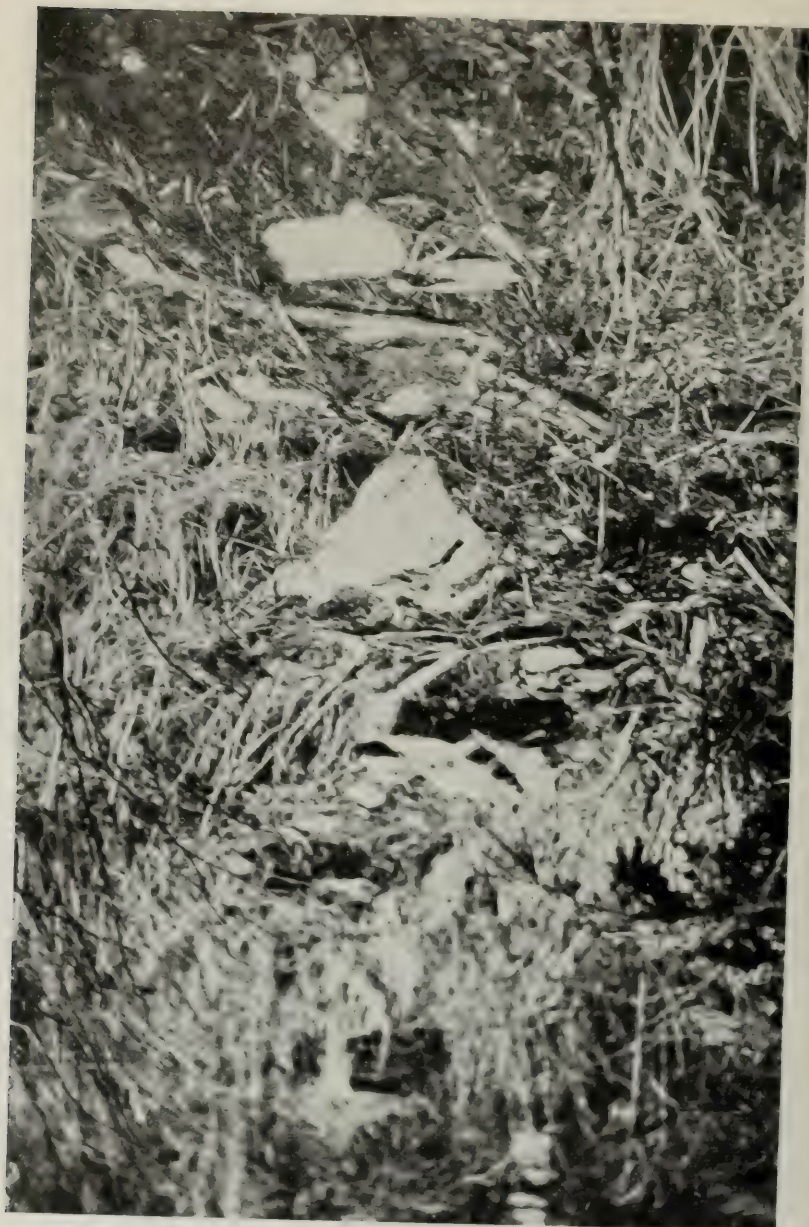
[Endorsed]: Plf's. Exhibit "D." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[864]

Plaintiff's Exhibit "E."



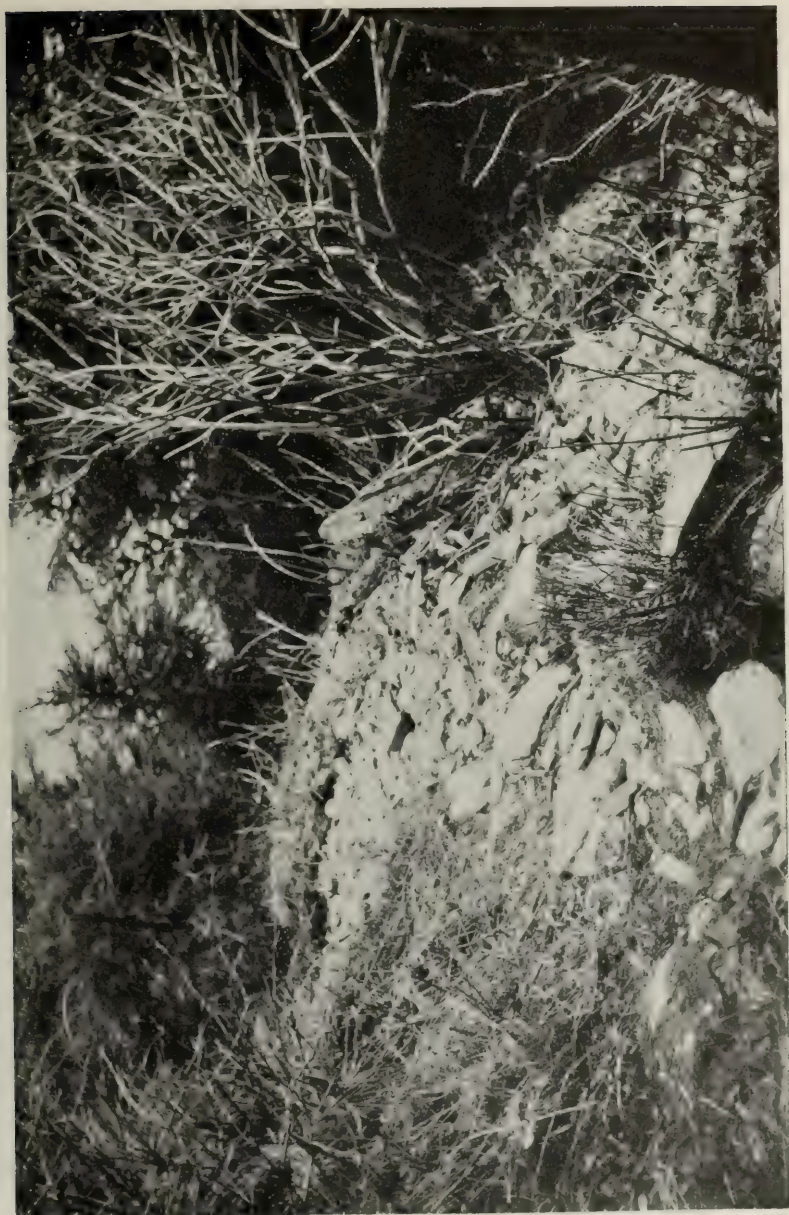
[Endorsed]: Plf's. Exhibit "E." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[864½]

Plaintiff's Exhibit "F."



[Endorsed]: Plf's Exhibit "F." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[865]

Plaintiff's Exhibit "G."



[Endorsed]: Plf's Exhibit "G." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy. [866]

Plaintiff's Exhibit "H."



[Endorsed]: Plf's Exhibit "H." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[867]

Plaintiff's Exhibit "I."



[Endorsed]: Plf's. Exhibit "I." Received in
evidence Mar. 23, 1921, In Cause No. 1990—A.
J. W. Bell, Clerk. By L. O. Green, Deputy.
[868]

Plaintiff's Exhibit "L."



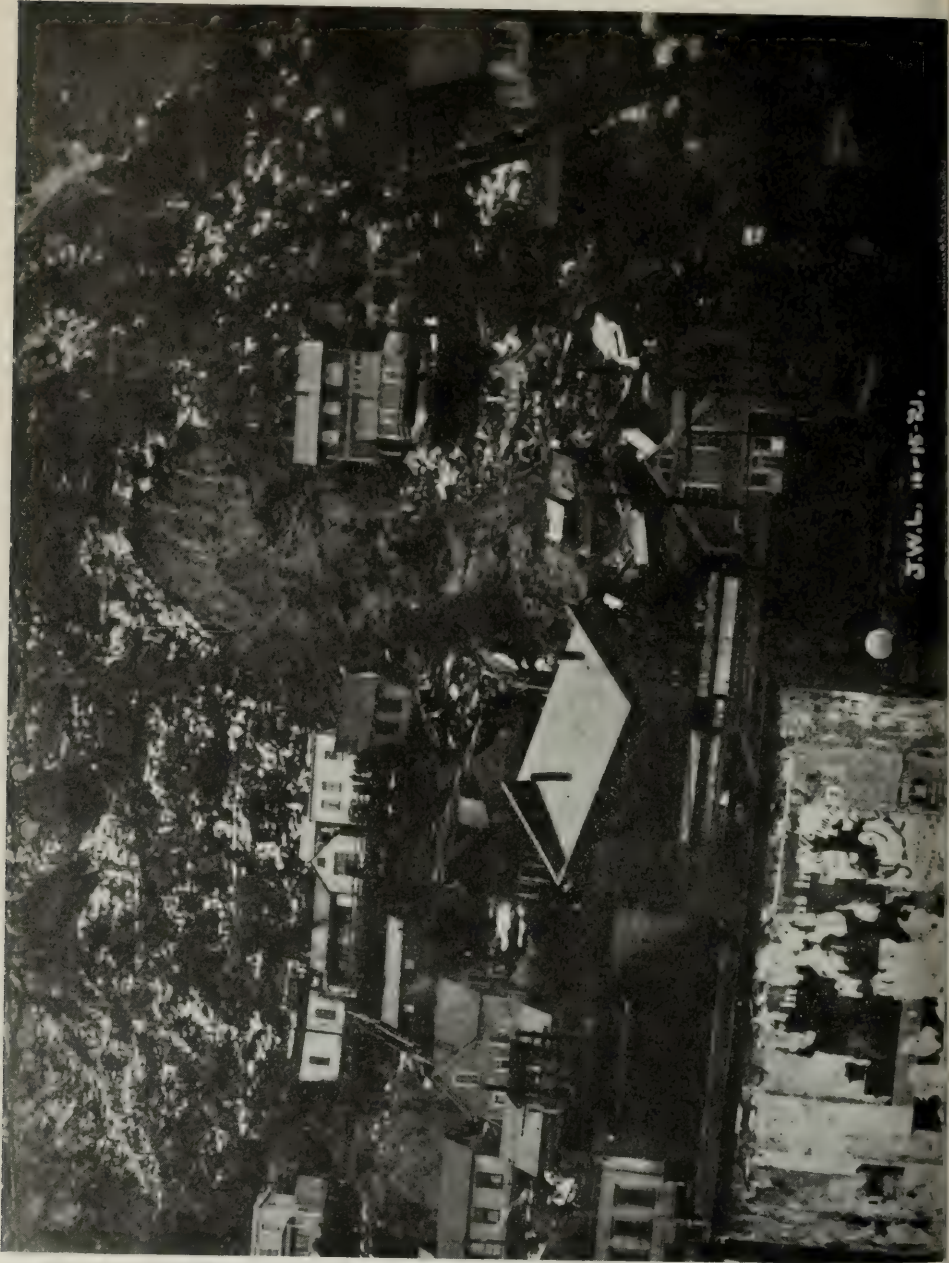
[Endorsed]: Plf's. Exhibit "L." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[871]





[Endorsed]: Plf's. Exhibit "N." Received in evidence Mar. 23, 1921, In Cause No. 1990—A.
J. W. Bell, Clerk. By L. O. Green, Deputy. [873]

Plaintiff's Exhibit "O."



[Endorsed]: Plf's Exhibit "O." Received in evidence Mar. 24, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[874]

Plaintiff's Exhibit "O-1."



[Endorsed]: Plf's. Exhibit "O-1." Received in evidence Mar. 23, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy. [875]

Plaintiff's Exhibit "P."

**UNITED STATES DEPARTMENT OF
AGRICULTURE.**

WEATHER BUREAU.

JUNEAU, ALASKA.

March 7, 1921.

I hereby certify that the data below are a true and accurate copy of the official record of the daily amounts of snow on the ground and of precipitation for the dates in question, as recorded by the United States Weather Bureau, Juneau, Alaska.

Average depth of snow on the ground at 8 P. M., December 25, 1919 to January 9, 1920:

25th, a trace, in spots; 26th, a trace; 27th, a trace; 28th 0.3 inch; 29th, 0.3 inch; 30th, 1.7 inch; 31st, 4.3 inch; January 1st, none; 2d, none; 3d none; 4th, 1.1 inches; 5th, 1.8 inches; 6th, none; 7th, none; 8th, none; 9th, none.

Amount of precipitation (rain and melted snow) from January 3 to 8, 1920.

3d, 0.38 inch; 4th, 0.14 inch; 5th, 0.80 inch; 6th, 2.05 inches; 7th; 4.25 inches; 8th, 0.25 inch.

Amount of precipitation from September 21 to 27, 1918: 21st, none; 22d, a trace; 23d, 0.76 inch; 24th, 0.03 inch; 25th, 2.46 inches; 26th, 4.95 inches; 27th, 0.01 inch. The maximum amount that fell in

any 24 consecutive hours during the 25th-26th was 5.54 inches, from 5:34 P. M. of the 25th to 5:34 P. M. of the 26th.

The maximum amount in any 24 hours in January, 1920, was 4.25 inches from midnight to midnight of the 7th.

M. B. SUMMERS,

Meteorologist, in Charge.

ADDENDA.

The amount of rainfall in the 24 hours ending at 11 A. M. January 2, 1920 was 0.66 inch, as shown by the records of the automatic rain gage.

M. B. SUMMERS,

Meteorologist, in Charge.

[Endorsed]: Pltfs. Exhibit No. "S." Received in evidence. Mar. 7, 1921. Cause No. 1947-A. J. W. Bell, Clerk. By ————, Deputy.

Plfs. Exhibit No. "P." Received in Evidence April 1, 1921. Cause No. 1990-A. J. W. Bell, Clerk. By L. O. Green, Deputy. [876]

Defendant's Exhibit No. 2.

UNITED STATES DEPARTMENT OF AGRICULTURE.

WEATHER BUREAU.

JUNEAU, ALASKA.

March 1, 1921.

I hereby certify that the data attached hereto are a true and accurate copy of the official record of the daily maximum, minimum and mean temperatures, precipitation, and snowfall at Juneau,

Alaska, from October 1, 1919 to January 2, 1920, inclusive, as recorded by the United States Weather Bureau.

M. B. SUMMERS,
Meteorologist, in Charge.

Defts. Exhibit No. 14. Received in evidence Mar. 5, 1921. Cause No. 1947-A. J. W. Bell, Clerk. By ———, Deputy.

Defts. Exhibit No. 1. Received in evidence Mar. 28, 1921. Cause No. 1990-A. J. W. Bell, Clerk. By L. O. Green, Deputy. [877]

Defts. Exhibit No. 2. Received in evidence Apr. 27, 1921. Cause No. 1949-A. J. W. Bell, Clerk. By ———, Deputy.

UNITED STATES DEPARTMENT OF AGRICULTURE.

WEATHER BUREAU.

JUNEAU, ALASKA.

Weather Conditions at Juneau, Alaska, as Recorded by U. S. Weather Bureau, October, 1919.

Date	Max. Temp.	Min. Temp.	Mean Temp.	Precipi- tation.	Snow- fall
1	56	34	45	.00	.0
2	51	42	46	1.49	.0
3	54	48	51	1.11	.0
4	52	49	50	.45	.0
5	52	39	46	3.00	.0
6	52	40	46	1.63	.0
7	47	34	40	.52	.1
8	41	32	36	.00	.0
9	38	32	35	.24	.4
10	45	34	40	.12	.0

Date	Max. Temp.	Min. Temp.	Mean Temp.	Precipi- tation.	Snow- fall
11	42	39	40	.03	.0
12	45	39	42	.05	.0
13	45	39	42	.04	.0
14	46	36	41	.00	.0
15	48	34	41	.03	.0
16	46	39	42	.43	.0
17	46	40	43	T	.0
18	47	40	44	.60	T
19	46	42	44	.24	.0
20	42	39	40	.82	.0
21	45	33	39	.10	.0
22	38	30	34	.00	.0
23	35	25	30	.00	.0
24	42	29	36	.00	.0
25	46	31	38	.00	.0
26	40	33	36	.06	.0
27	42	38	40	.36	.0
28	45	31	38	T	.0
29	42	29	36	.21	.0
30	39	33	36	.78	0.3
31	36	33	34	.18	1.3
<hr/>					
Mean	44.9	36.0	40.3	—	—
Total	—	—	—	12.49	2.1

Temperature is recorded in degrees Fahrenheit; precipitation and snowfall in inches. Precipitation includes rain and MELTED snow. "T" indicates a trace, or amount too small to measure. Data are for the 24 hours ending at midnight, except snow-

fall, which is for the 24 hours ending at 8 P. M.
[878]

UNITED STATES DEPARTMENT OF AGRICULTURE.

WEATHER BUREAU.

JUNEAU, ALASKA.

Weather Conditions at Juneau, Alaska, as Recorded by U. S. Weather Bureau, November, 1919.

Date	Max. Temp.	Min. Temp.	Mean Temp.	Precipitation.	Snowfall
1	37	23	30	.00	.7
2	34	20	27	.00	.0
3	28	21	24	.00	.0
4	26	17	22	.00	.0
5	30	14	22	.00	.0
6	30	19	24	.00	.0
7	28	18	23	.14	.0
8	33	26	30	.73	7.1
9	35	23	29	.00	.0
10	33	20	26	.00	.0
11	30	18	24	.00	.0
12	34	18	26	.75	.3
13	44	33	38	.50	.0
14	44	37	40	.20	.0
15	41	35	38	.62	.4
16	44	39	42	.29	.0
17	50	38	44	1.52	.0
18	47	39	43	1.37	.0
19	40	34	37	.53	.4
20	43	36	40	2.19	.0
21	39	35	37	.28	.2
22	38	31	34	.05	T

Date	Max. Temp.	Min. Temp.	Mean Temp.	Precipi- tation.	Snow- fall
23	35	21	28	.00	.0
24	27	19	23	.00	.0
25	31	19	25	.00	.0
26	28	18	23	.15	.0
27	30	25	28	.35	5.0
28	33	30	32	.24	1.5
29	34	24	29	.02	2.4
30	28	22	25	.00	.0
Mean	35.1	25.7	30.4	—	—
Total	—	—	—	9.93	18.0

Temperature is recorded in degrees Fahrenheit; precipitation and snowfall in inches; precipitation includes rain and MELTED snow. "T" indicates a trace, or amount too small to measure. Data are for the 24-hours ending at midnight, except snowfall, which is for the 24-hours ending at 8 P. M. [879]

UNITED STATES DEPARTMENT OF AGRICULTURE.

WEATHER BUREAU.

JUNEAU, ALASKA.

Weather Conditions at Juneau, Alaska, as Recorded by U. S. Weather Bureau, December, 1919.

Date	Max. Temp.	Min. Temp.	Mean Temp.	Precipi- tation.	Snow- fall
1	28	17	22	.00	.0
2	27	16	22	.04	.1
3	30	24	27	.12	1.5
4	31	25	28	.01	.8

1050 *Alaska Juneau Gold Mining Company*

Date	Max. Temp.	Min. Temp.	Mean Temp.	Precipi- tation.	Snow- fall
5	34	25	30	.07	.1
6	36	26	31	.10	.0
7	29	21	25	.00	.0
8	33	21	27	.00	.0
9	23	17	20	.00	.0
10	23	14	18	.00	.0
11	26	18	22	.00	.0
12	29	22	26	T	.0
13	30	29	30	.19	2.3
14	31	25	28	.51	4.0
15	25	22	24	.30	6.3
16	44	21	32	.48	.7
17	46	39	42	1.12	.0
18	41	29	35	.39	T
19	35	28	32	.10	1.8
20	33	26	30	.00	.0
21	37	21	29	.01	T
22	41	30	36	.30	.5
23	44	36	40	.82	T
24	44	39	42	.31	.0
25	44	35	40	.48	.0
26	45	35	40	.76	T
27	35	31	33	.01	T
28	32	24	28	.01	.3
29	27	19	23	.00	.0
30	30	18	24	.32	1.4
31	40	30	35	1.24	6.9
—	—	—	—	—	—
Mean	34.0	25.3	29.6	—	—
Total				7.69	26.7
—	—	—	—		

Temperature is recorded in degrees Fahrenheit; precipitation and snowfall in inches; precipitation includes rain and MELTED snow. "T" indicates a trace, or amount too small to measure. Data are for the 24 hours ending at midnight, except snowfall, which is for the 24 hours ending at 8 P. M. [880]

UNITED STATES DEPARTMENT OF AGRICULTURE.

WEATHER BUREAU.

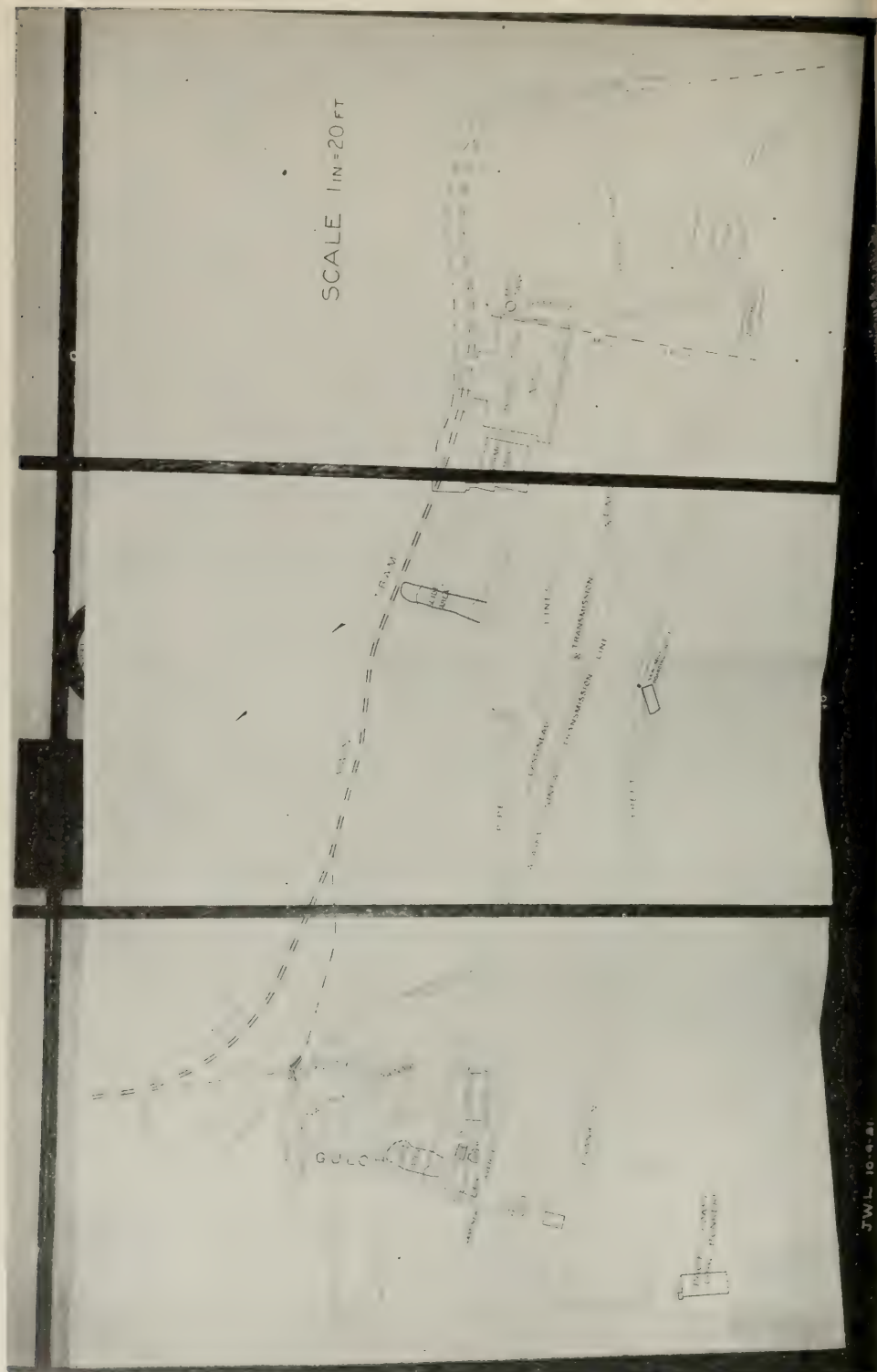
JUNEAU, ALASKA.

Weather Conditions at Juneau, Alaska, as Recorded by U. S. Weather Bureau, January, 1920.

	Max.	Min.	Mean	Precipi-	Snow-
Date	Temp.	Temp.	Temp.	tation.	fall
1	40	37	38	1.57	.0
2	43	37	40	1.52	.0

Temperature is recorded in degrees Fahrenheit; precipitation and snowfall in inches; precipitation includes rain and melted snow. "T" indicates a trace, or amount too small to measure. Data are for the 24 hours ending at midnight, except snowfall, which is for the 24 hours ending at 8 P. M. [880½]

Defendant's Exhibit No. 2.



[Endorsed]: Dft's. Exhibit No. 2. Received in Evidence Mar. 28, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[881]

Defendant's Exhibit No. 3.



[Endorsed]: Dft's. Exhibit No. 3. Received in Evidence Mar. 28, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.

Defendant's Exhibit No. 4.



[Endorsed]: Dft's. Exhibit No. 4. Received in
Evidence Mar. 28, 1921, In Cause No. 1990—A.
J. W. Bell, Clerk. By L. O. Green, Deputy.
[883]

Defendant's Exhibit No. 5.



[Endorsed]: Dft's. Exhibit No. 5. Received in
Evidence Mar. 28, 1921, In Cause No. 1990—A.
J. W. Bell, Clerk. By L. O. Green, Deputy.
[8841]

588-

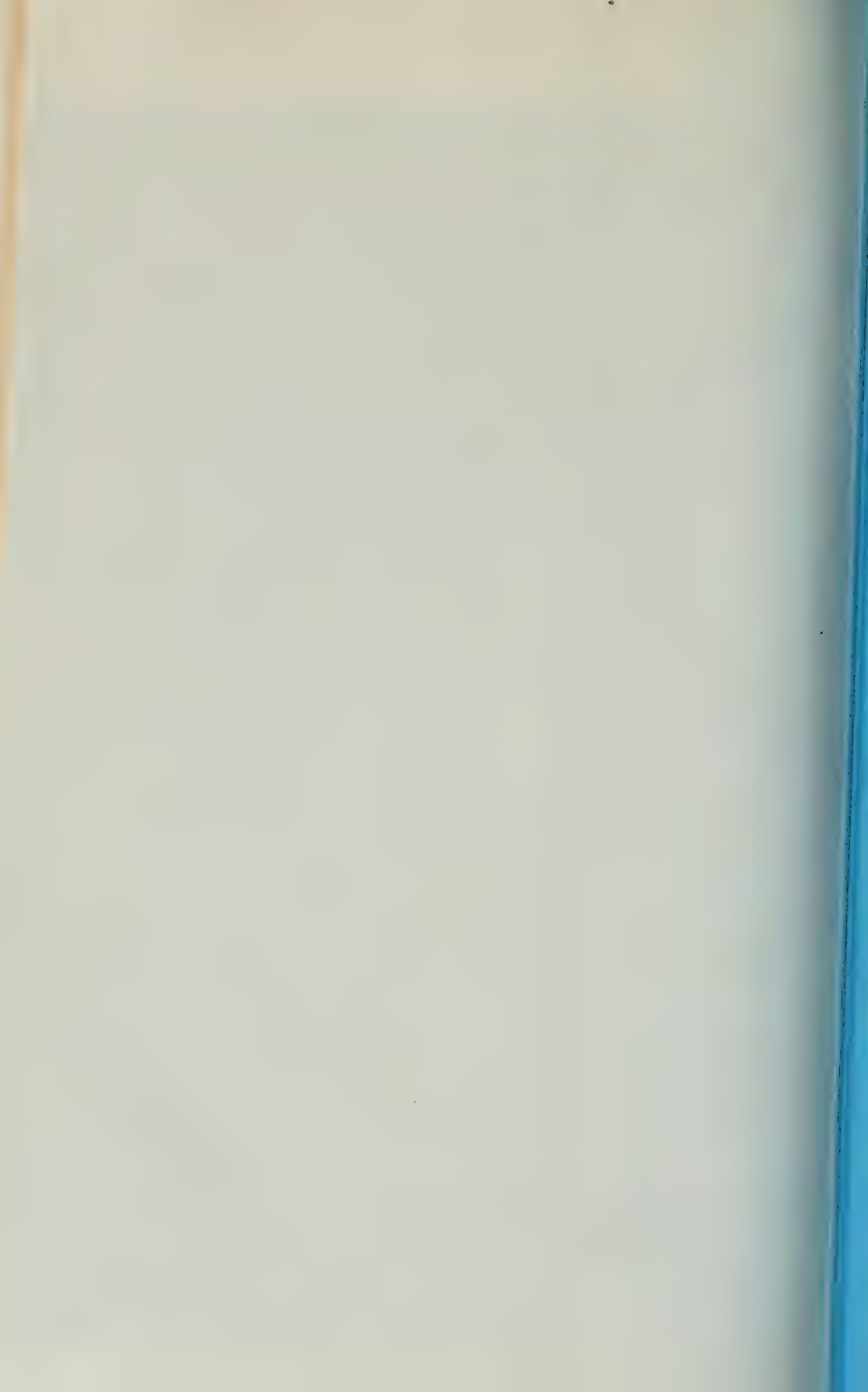


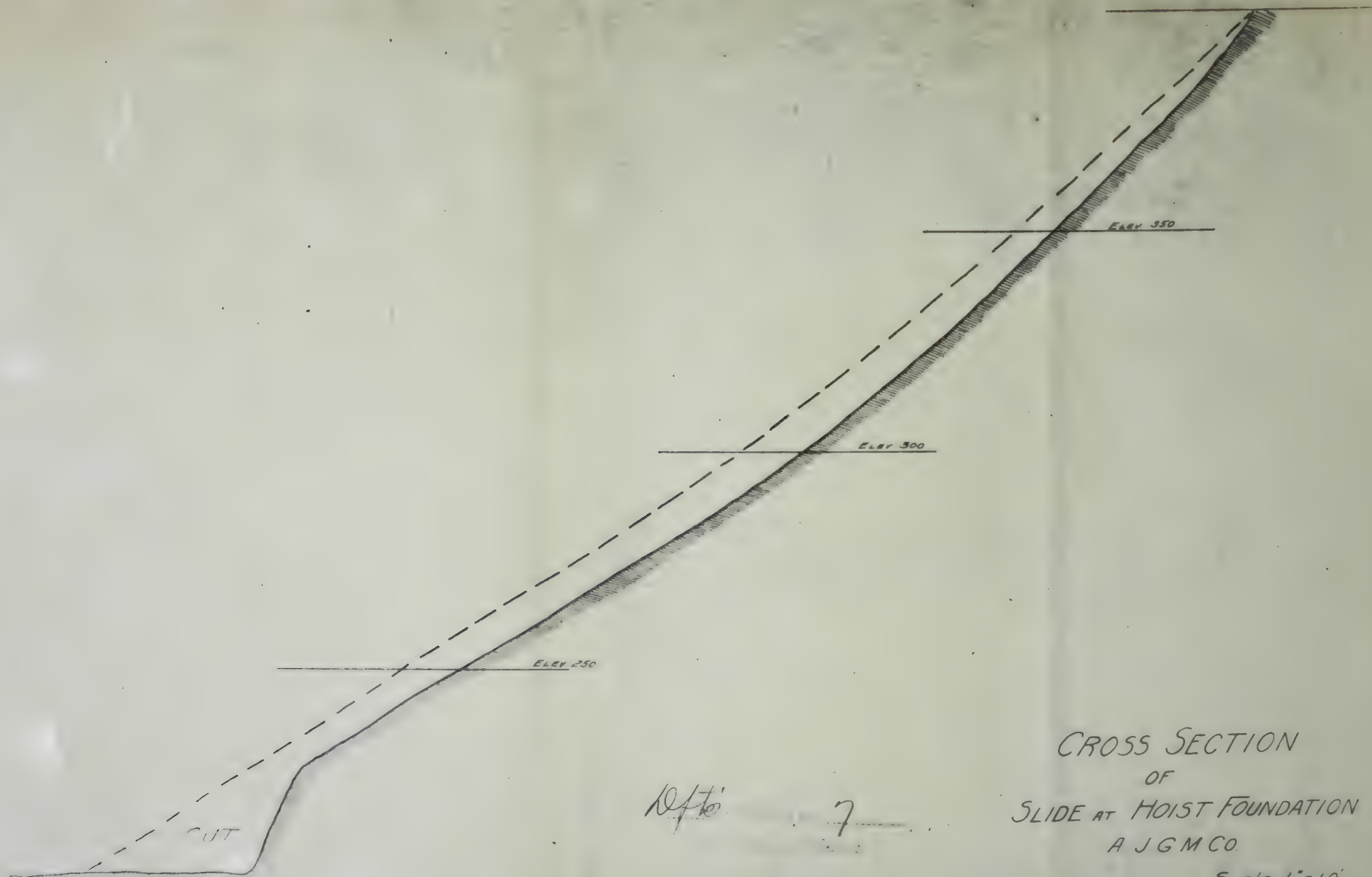
Opt. EXHIBIT No. 6
 Received in evidence

CROSS SECTION A-A
 Scale 1"=10'

May 28 1921

J. W. Bell 1990-a
 Clerk
 [Signature] Deputy





10/10

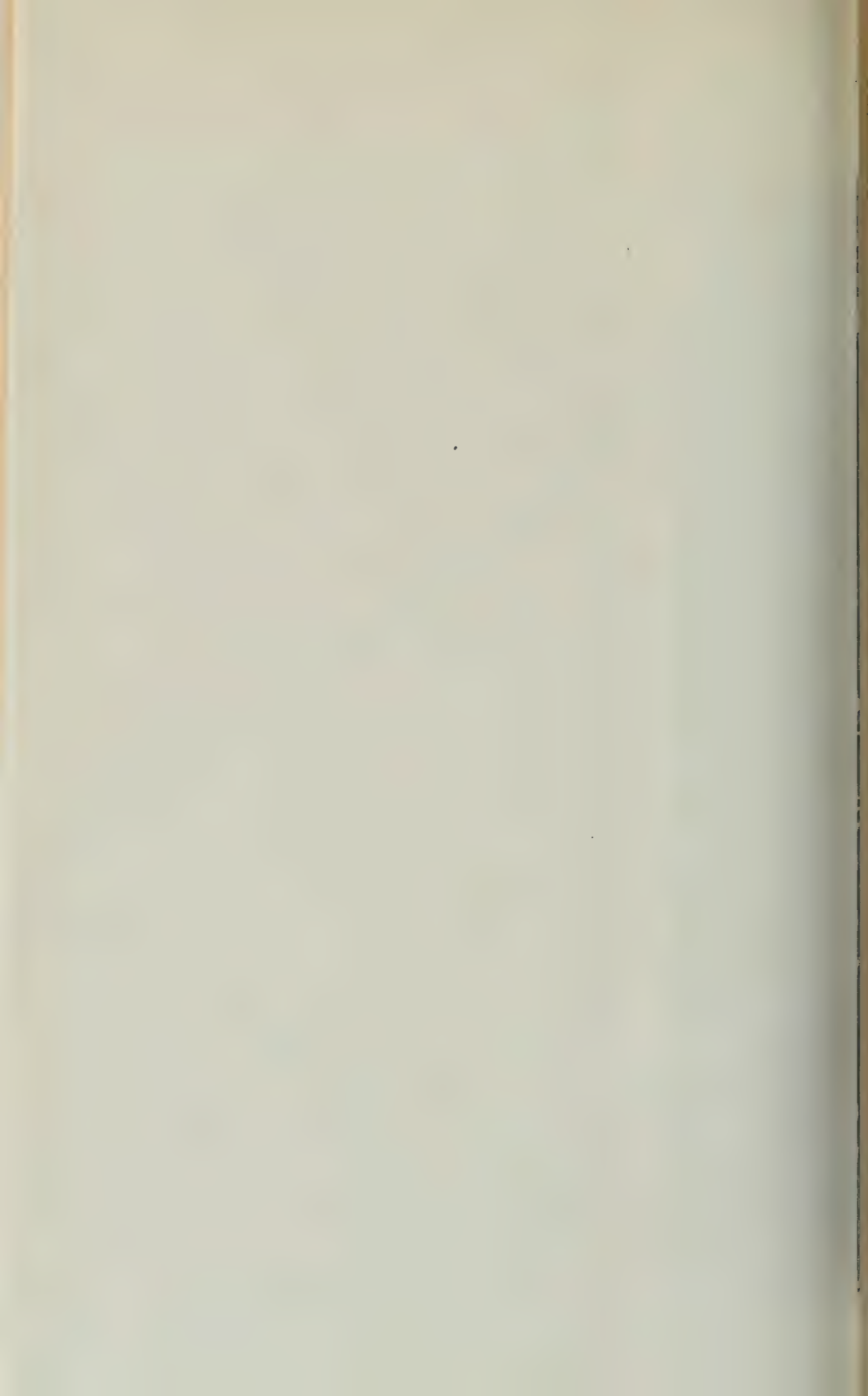
7

21

1991-A

J. G. Bell
J. G. M. Co.

J. G. M. Co.

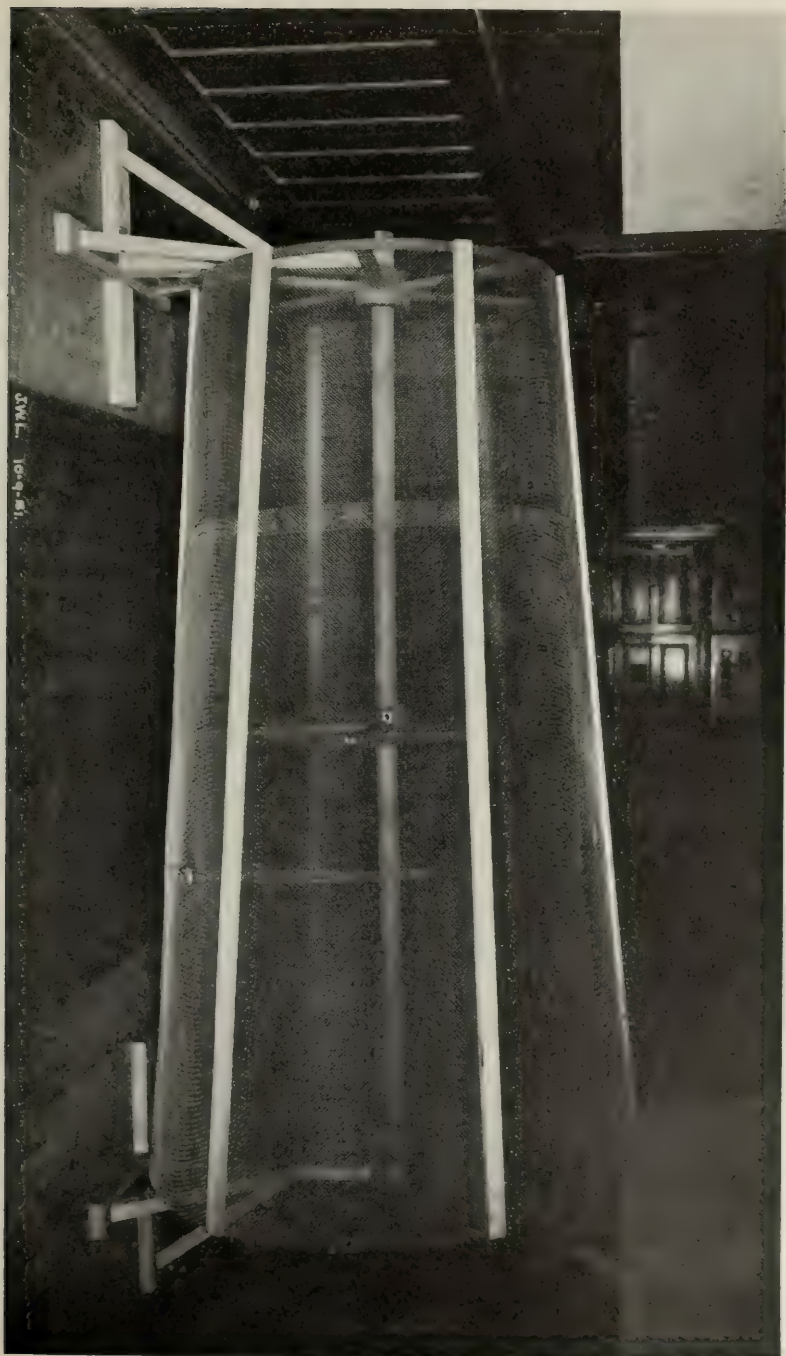


Defendant's Exhibit No. 8.



[Endorsed]: Dft's. Exhibit No. 8. Received in Evidence Mar. 28, 1921, In Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[887]

Defendant's Exhibit No. 9.



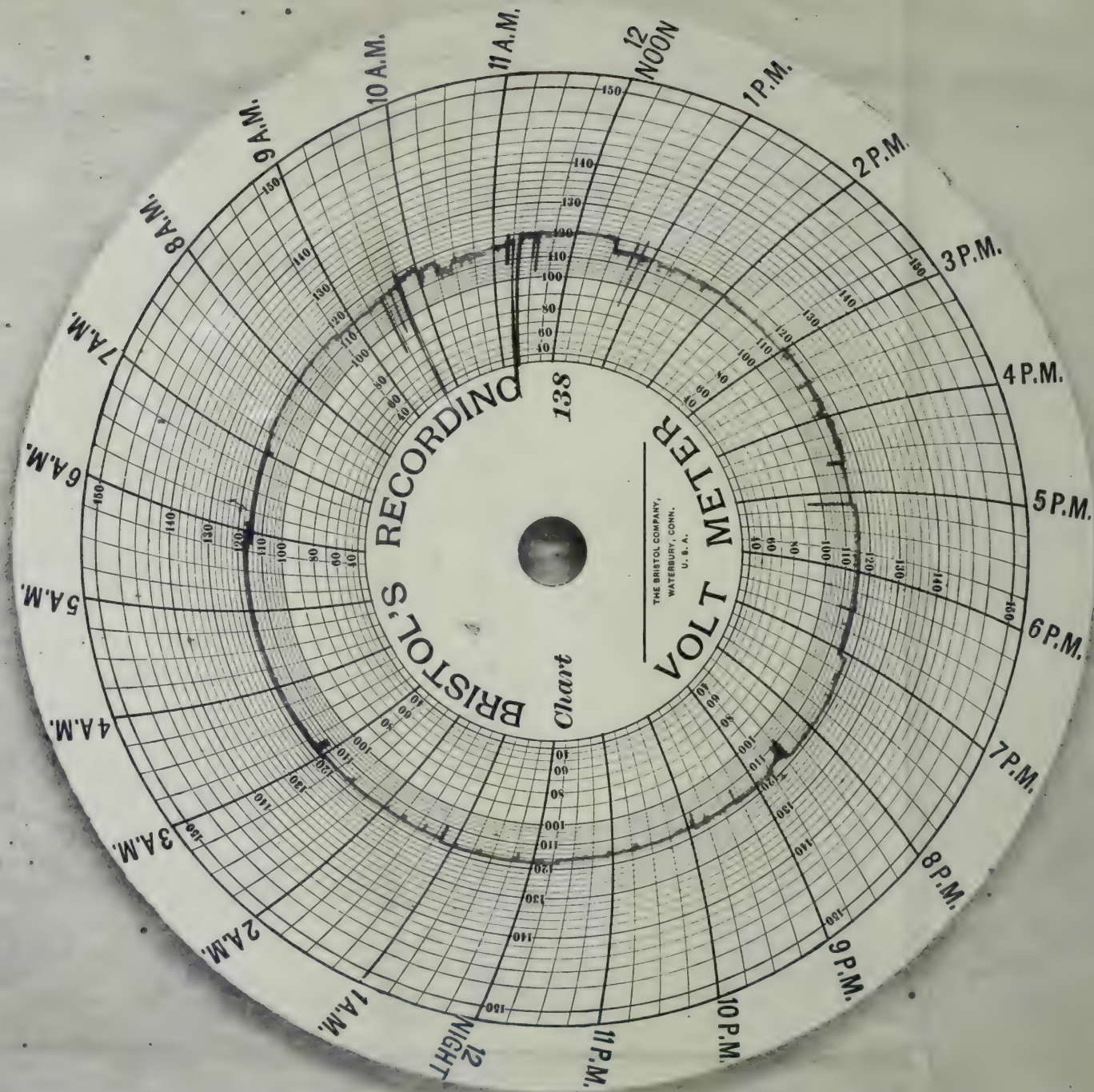
[Endorsed]: Dft's. Exhibit No. 9. Received in evidence Mar. 29, 1921, in Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[888]

Defendant's Exhibit No. 10.



[Endorsed]: Dft's. Exhibit No. 10. Received in evidence April 1, 1921, in Cause No. 1990—A. J. W. Bell, Clerk. By L. O. Green, Deputy.
[889]







Order Settling Bill of Exceptions.

This matter coming on to be heard on the motion of the Alaska Juneau Gold Mining Company to settle and allow the bill of exceptions herein, and it appearing to the Court that the above and foregoing cause came on regularly for trial before the Honorable Robert W. Jennings, the then Judge of this court in the manner and at the time in the foregoing bill of exceptions stated that the evidence and proceedings were recorded by the Court stenographer and that the proceedings above enumerated were thereupon duly had and that the above and foregoing bill of exceptions contains all the evidence adduced at the trial by both parties and is a full, complete, accurate and correct record of all the proceedings had and of the whole thereof and that the foregoing bill of exceptions in all respects speaks the truth,—

NOW, THEREFORE, I, the undersigned, Judge of the United States District Court for the Territory of Alaska, Division Number One, successor to Hon. Robert W. Jennings, do hereby certify that the foregoing bill of exceptions was duly and regularly presented within the time allowed therefor; that it contains all the evidence adduced at the trial and is a full, complete, accurate and correct record of all the proceedings had in connection with said cause and of the whole thereof and that the same in all respects speaks the truth.

AND IT IS HEREBY ORDERED that the foregoing bill of exceptions be and the same is hereby

settled and allowed and made a part of the record in this cause.

Done in open court this 31st day of October, 1921.

T. M. REED,

Judge of the Above-entitled Court.

Filed in the District Court, District of Alaska,
First Division. Oct. 31, 1921. John H. Dunn,
Clerk. By J. E. Spray, Deputy. [891]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco.

Case No. 1990-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

Petition for Writ of Error.

To the Honorable THOMAS M. REED, Judge of
the District Court for the Territory of Alaska,
Division Number One:

COMES NOW the above-named Alaska Juneau Gold Mining Company, a corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of Alaska, Division Number One, in Case No. 1990-A Isadore Goldstein, plaintiff and defendant in error, against the Alaska Juneau Gold Mining Company, defendant, and plaintiff in error, and also the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against Alaska Juneau Gold Mining Company on the 6th day of September, 1921, wherein the District Court for the Territory of Alaska adjudged the defendant, the Alaska Juneau Gold Mining Company to be indebted to the plaintiff Isadore Goldstein in the sum of \$13,775.00, and therein the plaintiff Isadore Goldstein was given judgment against the defendant [892] the Alaska Juneau Gold Mining Company for the sum of \$13,775.00, and costs taxed at \$144.80 manifest error hath happened to the great damage of said Alaska Juneau Gold Mining Company as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Juneau Gold Mining Company prays for the allowance of a writ of error, and for an order fixing the amount of the cost

and supersedeas bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2d day of November, 1921.

HELLENTHAL & HELLENTHAL,
Attorneys for the Alaska Juneau Gold Mining
Company.

Copy received October 2, 1921.

RODEN & DAWES,
Attorneys for Isadore Goldstein.

Filed in the District Court, District of Alaska,
First Division. Nov. 2, 1921. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [893]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Supersedeas and Cost Bond.**

This matter coming on to be heard on the petition of the Alaska Juneau Gold Mining Company for a writ of error, the assignment of errors having been

regularly filed with said petition, and the writ of error is hereby allowed as prayed for in said petition and the amount of the supersedeas and cost bond is fixed at Sixteen Thousand Dollars (\$16,000), to be approved by the Court or the clerk thereof.

Dated this 2d day of Nov. 1921.

THOS. M. REED,
Judge.

Copy received Nov. 2d, 1921.

RODEN & DAWES,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Nov. 2, 1921. John H. Dunn, Clerk. By L. E. Spray, Deputy.

Entered Court Journal No. Q, page 390. [894]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Alaska Juneau Gold Mining Company, a corporation, as principal, and John Reck, as surety, are held and firmly bound unto the above-named Isadore Goldstein in the just and full sum of sixteen thousand dollars, to be paid to the said Isadore Goldstein, his attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2d day of Nov., 1921.

WHEREAS, lately in the District Court for the Territory of Alaska, Division Number One, in an action therein pending between Isadore Goldstein, as plaintiff, and the Alaska Juneau Gold Mining Company, as defendant, a judgment was rendered against the said Alaska Juneau Gold Mining Company for the sum of \$13,775.00 and costs, and the said Alaska Juneau Gold Mining Company having obtained a writ of error, and filed a copy thereof in

the clerk's office of the said Court to reverse the judgment in the aforesaid action and the citation directed to the said Isadore Goldstein, citing and admonishing him to be and appear at the session of the United States [895] Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of approval of this bond.

NOW, the condition of the above obligation is such that if the said Alaska Juneau Gold Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then and in that event the above obligation to be void; otherwise to remain in full force and virtue.

ALASKA JUNEAU GOLD MINING COM-
PANY,

By P. R. BRADLEY,
Its Attorney Principal.
JOHN RECK,
Surety.

Signed, sealed and delivered in the presence of:

A. G. SHOUP,
J. W. KEHOE.

O. K.—HENRY RODEN,

For Plaintiff.

Approved Nov. 2, 1921.

THOS. M. REED,
District Judge.

Filed in the District Court, District of Alaska,
First Division. Nov. 2, 1921. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [896]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable THOMAS M. REED, Judge of
the District Court for the Territory of Alaska,
Division Number One, GREETING:

Because of the record and proceedings, as also

in the rendition of the judgment of a plea, which is in said District Court, Division Number One thereof, before you, between Isadore Goldstein, as plaintiff, and the Alaska Juneau Gold Mining Company, a corporation, as defendant, a manifest error hath happened to the great prejudice and damage of the said Alaska Juneau Gold Mining Company as set forth and appears by the petition herein.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment [897] be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place and said Circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 2d day of Nov., A. D. 1921.

Attest my hand and seal of the District Court for the Territory of Alaska, Division Number One, at

the Clerk's office at Juneau on the day and year last
above written.

[Seal] JOHN H. DUNN,
Clerk of the District Court for the Territory of
Alaska, Division Number One.

By L. E. SPRAY,
Deputy Clerk.

Allowed this 2d day of Nov., A. D. 1921.

THOS. M. REED,
Judge.

Copy received Nov. 1921.

RODEN & DAWES,
For Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Nov. 2, 1921. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [898]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN.

Plaintiff,

VS.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

Citation on Writ of Error.

The President of the United States to ISADORE
GOLDSTEIN, the Above-named Plaintiff,
GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Juneau Gold Mining Company, a corporation is the plaintiff in error and you, the said Isadore Goldstein, are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, [899] this 2d day

of Nov., 1921, and of the Independence of the United States the 145th.

THOS. M. REED,
Judge.

Copy received Nov. 2, 1921.

RODEN & DAWES,
Attorneys for Plaintiff. [900]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,
Plaintiff,
vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant.

**Order Extending Time Forty Days to Forward and
File Record on Appeal (Dated November 22,
1921).**

On motion of Hellenthal & Hellenthal, attorneys for the defendant above named, made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted,—

IT IS ORDERED that forty days' additional time from the date hereof is hereby granted in order

to forward and file the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 22d day of November, 1921.

THOS. M. REED,
Judge.

O. K.—HENRY RODEN.

Filed in the District Court, District of Alaska, First Division. Nov. 22, 1921. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. Q, page 419. [901]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Extending Time to and Including January
10, 1922, to Complete Record on Appeal.**

On motion of Hellenthal & Hellenthal, attorneys for the defendant above named, made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth

Circuit at San Francisco within the time granted in the citation and the extension granted,—

IT IS ORDERED that an extension of time to and including January tenth, 1922, is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 16th day of December, 1921.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 16, 1921. John H. Dunn, Clerk. By L. E. Spray, Deputy.

O. K.—RODEN. [901-A]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.

Case No. 1990-A.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

Assignment of Errors.

Comes now the Alaska Juneau Gold Mining Company, and with its petition for writ of error herein, files and presents this, its assignment of errors, the errors so assigned being the errors upon which the said Alaska Juneau Gold Mining Company will rely for a reversal of the judgment herein.

ASSIGNMENT OF ERROR No. ONE.

That the evidence is insufficient to justify the verdict.

ASSIGNMENT OF ERROR No. TWO.

That the Court erred in denying defendant's motion for a directed verdict made at the close of the case, after the evidence on behalf of both parties had been adduced, submitted and closed, for the reasons stated in said motion, which is incorporated in the bill of exceptions and to which reference is hereby made. [902]

ASSIGNMENT OF ERROR No. THREE.

That the Court erred in instructing the jury as follows:

“If your verdict should be for the plaintiff, it should be for such sum as you may find from the evidence he has been damaged, as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money.”

to which portion of the Court's charge the defendant excepted on the ground that there was no evidence under which the jury could assess damages, there being no evidence of market value, nor evidence of the extent of the loss or damage if any, sufficient for the jury to assess damages.

ASSIGNMENT OF ERROR No. FOUR.

That the Court erred in refusing to instruct the jury to bring in a verdict for the defendant.

ASSIGNMENT OF ERROR No. FIVE.

That the Court erred in overruling the motion for a new trial.

ASSIGNMENT OF ERROR No. SIX.

That the Court erred in entering a judgment.

Because of the several errors above enumerated the Alaska Juneau Gold Mining Company prays that the judgment herein be set aside and reversed.

HELLENTHAL & HELLENTHAL,

Attorneys for the Alaska Juneau Gold Mining Company.

Copy received Nov. 2d, 1921.

RODEN & DAWES,

Attorneys for Isadore Goldstein.

Filed in the District Court, District of Alaska, First Division. Nov. 2, 1921. John H. Dunn, Clerk. By L. E. Spray, Deputy. [903]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

Case No. 1990-A.

ISADORE GOLDSTEIN,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Praeipice for Transcript of Record.

Kindly prepare certified copies for transmission to the Circuit Court of Appeals in connection with your return on the Writ of Error herein, as follows: Complaint and bill of particulars, answer, reply, bill of exceptions, petition for writ of error, order allowing writ of error and fixing amount of supersedeas bond, supersedeas bond and order approving same, writ of error, citation, orders extending time and assignments of error.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.

Filed in the District Court, District of Alaska,
First Division. Nov. 8, 1921. John W. Dunn,
Clerk. By L. E. Spray, Deputy. [904]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 905 pages of typewritten matter, numbered from one to 904, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for plaintiff in error on file in my office and made a part hereof, in Cause No. 1990-A, wherein Alaska Juneau Gold Mining Company, a corporation, is defendant and plaintiff in error and Isadore Goldstein is plaintiff and defendant in error.

I further certify, that the said record is by virtue of a writ of error and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to the sum of four hundred seven and 45/100 dollars (407.45) has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 16th day of December, 1921.

[Seal]

JOHN H. DUNN,
Clerk.

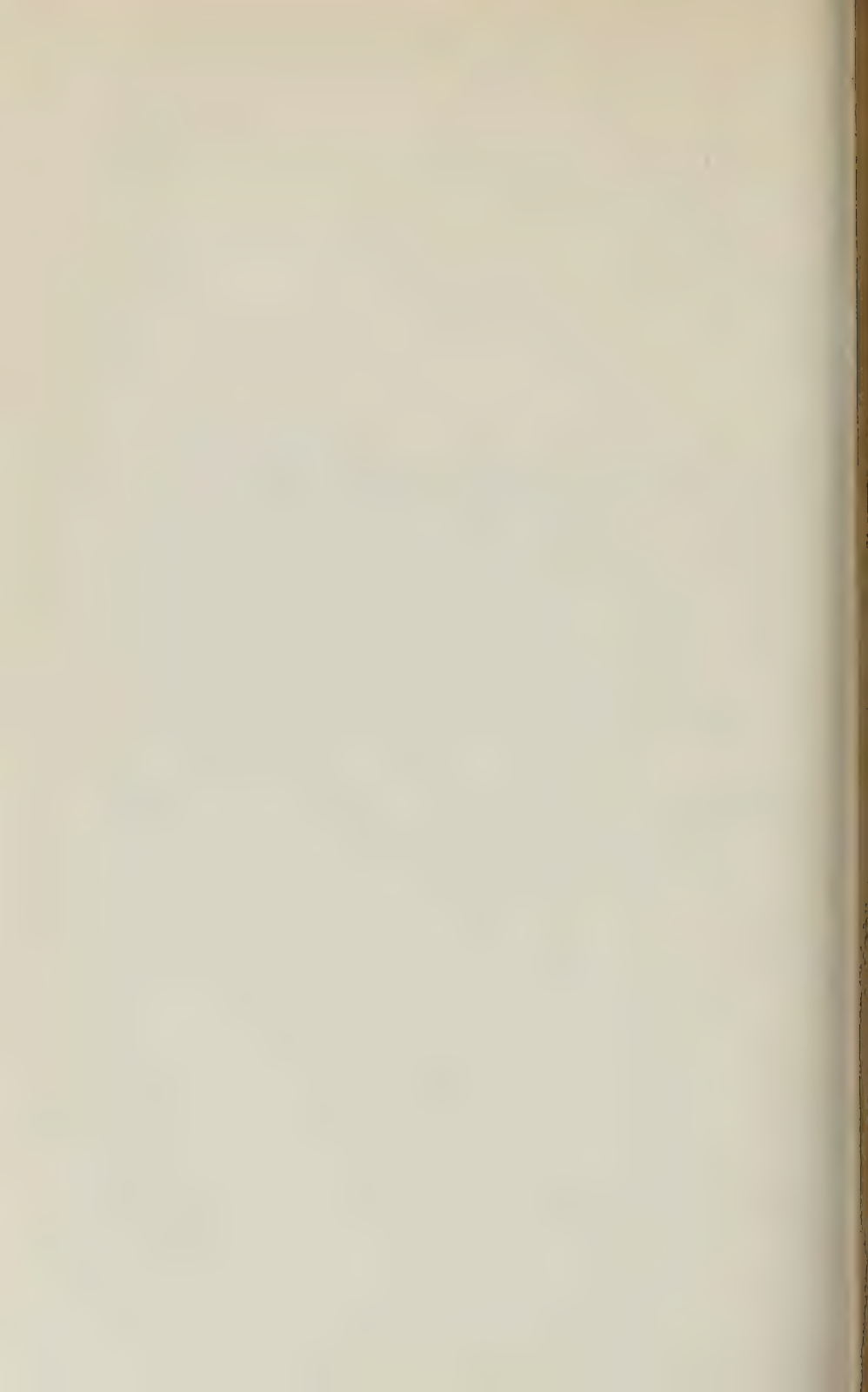
By _____,
Deputy. [905]

[Endorsed]: No. 3813. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff in Error, vs. Isadore Goldstein, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed December 27, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



No. 3813

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),

Plaintiff in Error,

VS.

ISADORE GOLDSTEIN,

Defendant in Error.

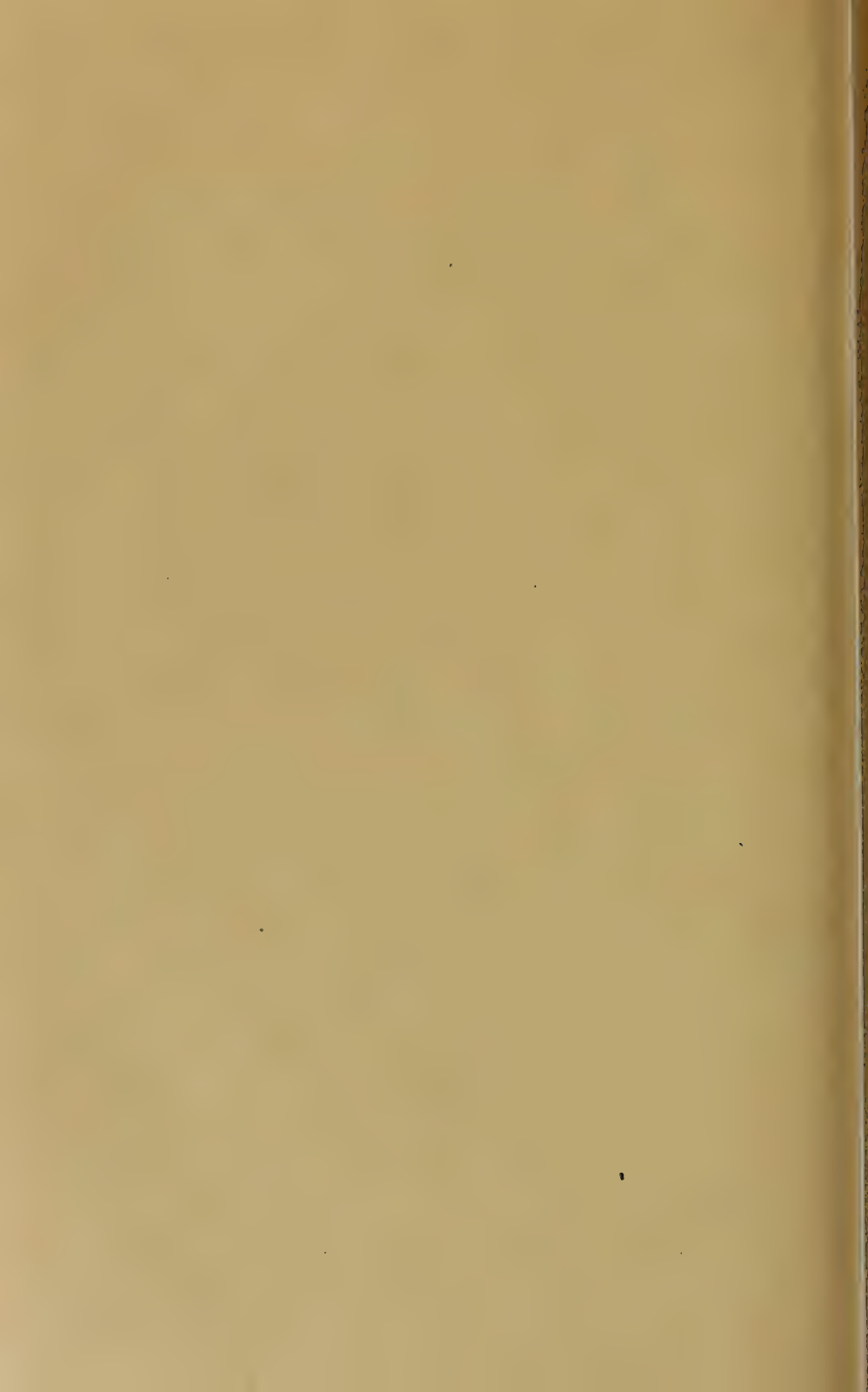
BRIEF FOR PLAINTIFF IN ERROR.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

FILED

FEB 21 1922

F. D. MONCKTON,
CLERK.



No. 3813

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),

Plaintiff in Error,

VS.

ISADORE GOLDSTEIN,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This case was brought in the District Court of Alaska by the defendant in error against the plaintiff in error to recover damages to property alleged to have been caused by a landslide that occurred on the slope of Mount Roberts near the town of Juneau, on January 2nd, 1920.

It was claimed by the defendant in error that the plaintiff in error negligently permitted water to escape from its flume maintained by it on the mountainside to convey a portion of the waters of Gold Creek, appropriated and diverted by it, to its mill, where such waters were applied to use. It was claimed that the water so escaping found its

way down the mountainside and caused a landslide, and that the landslide so caused occasioned the damage complained of.

The specific charge of negligence was that plaintiff's flume emptied into a penstock from which the water passed into a pipe, and that on the day mentioned the penstock overflowed

"for the reason that there was more water conveyed through said flume to the said penstock than was carried away from said penstock by the distribution pipe or otherwise" * * * "that the defendant either negligently or designedly on the said 2nd day of January, 1920, prior to the injury complained of, permitted more water to flow into said flume and to be conveyed by said flume to said penstock than was taken away by the service pipe. That by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the service pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises here in question, or otherwise occasioned damage."

It was further claimed that the defendant should have maintained such a flume and should have provided a series of spillways along this flume so that the surplus water could have been released along this flume before it reached the penstock.

The defendant denied the negligence charge and denied that any water escaped from its flume or penstock prior to the slide, and in this connection

averred that the water diverted by it, as before stated, was conveyed through a flume until it reached a point above the premises of the defendant in error where the flume emptied into a penstock from which the water was conveyed by different pipes, one of which was a small pipe which conveyed water to the power plant for boiler feed purposes; another a somewhat larger pipe which was connected with the city water mains so as to make the water available for the use of the city for fire-fighting purposes; and still another, a much larger pipe, which conveyed all the water not carried by the other two pipes to the mill tank situate in the plaintiff in error's mill. That it was necessary to install a screen in this penstock for the purpose of taking from the water such leaves and other debris as might be carried in it before the water was allowed to enter the pipes and be carried to the different point of use. That for this purpose a trommel screen, which is a type of revolving screen, was installed. That this screen was driven by an electric motor which caused it to revolve and in that manner to keep itself clean. That this motor was supplied with electric current from plaintiff in error's general electrical system. That the devices above referred to were the most approved type of devices known and were installed and maintained with the highest degree of engineering skill. That the plaintiff in error maintained a transmission line along the hillside extending across the mass that slid on the occasion referred to in the pleadings; that the

Alaska Gastineau Mining Company also maintained a transmission line along this hillside; that one of the towers on which the line of the Alaska Gastineau Company was strung stood on the mass that slid and that the transmission line of the Alaska Gastineau Company crossed the transmission lines of the plaintiff in error a short distance from the slide area.

That a short time before the mass was precipitated down the hillside it moved to such an extent that the tower of the Alaska Gastineau Company, standing upon it was set in motion, as a result of which the wires strung thereon commenced to oscillate and were, as a result thereof, brought in contact with the transmission lines of the plaintiff in error. That, as a result of this contact, a short circuit occurred which interrupted the power on plaintiff in error's system so that the motor by which the trommel screen was driven was deprived of electric current and brought to a standstill.

That another slide occurred shortly before this time at Wood's Gulch at a point above plaintiff in error's flume line, as a result of which the water then running in flume was heavily charged with leaves and other debris so that when the screen was brought to a stop the meshes filled up quickly and caused the screen to overflow and a portion of the water carried by the flume did flow over the screen and out of the spout designed to carry away the leaves and debris screened from the water.

The claim of the defendant in this connection being that no water escaped from its diverting works until after the ground had started to move, and that this movement of the ground was the direct cause that resulted in this overflow.

It was further claimed by the plaintiff in error that the slide which occasioned the damage complained of was occasioned by causes not under the control of the plaintiff in error. That one Koski had made excavations on the side of the mountain which had the effect of cutting off the toe from the mass that slid and of depriving it of lateral support; that the ground had been covered with loose snow, upon which the rain had been falling for some time past, so as to cause it to melt and soak in, thereby making the mass above heavy and slippery; and that because the mass had been deprived of its support by Koski, and that because it had been made both heavy and slippery by rain and melting snow, it slid down the hillside on the occasion referred to.

The plaintiff in error also denied the allegations of injury and damage set up in the complaint. The affirmative matter set up was in turn denied by the defendant in error, and upon the issue so framed the cause went to trial.

The plaintiff in error called a number of witnesses who testified that they saw, while standing in the streets of Juneau, a quantity of water coming from plaintiff in error's flume. Some testified that it came from the flume and others spoke of the pen-

stock as the point where the overflow was observed. Each and all of these witnesses, however, described the stream observed by them as being a wide stream, some placing its width at two feet or more and others estimating its width to as much as five or six feet; and each described it as being of such a character that its width, and not its depth or thickness, could be observed from the viewpoint of the witnesses.

It was shown in evidence that at a point a short distance from the penstock, snow sheds designed to protect the portal of a tunnel picked up the water flowing in a gulch and discharged the same on top of a flume built along under the eave of the snow shed in such a manner that this water flowed off from the covering built over the flume at that point with a view of keeping this water from running into this flume itself and that this water so making its appearance over the ends of the flume appeared to any one standing in the streets of Juneau, over a quarter of a mile away, as though it were water coming from the flume itself. And that the stream which so made its appearance flowed towards the town so that its width could be observed while its depth or thickness could not be seen.

It was also shown in evidence that the spout installed at the penstock for the purpose of carrying leaves and debris screened from the water, pointed in the direction of Mount Juneau and not towards the town; that it was pointed in such a manner that if water were coming from it anyone standing on

the streets of Juneau would be unable to see the width of the stream but would be looking in an edge of it, so that its width or thickness alone could be observed. The contention of the plaintiff in error being that these witnesses were simply mistaken in regard to the stream of water observed by them and that what they saw was the surface water picked up under the eave of the snow sheds and in that manner caused to spout off from the roof on the covering of the flume and not water flowing from the rubbish spout at the penstock.

The defendant in error also called one witness who testified that he passed the penstock spout at seven o'clock in the morning and that he saw a small quantity of water coming from the spout at that time. He said the quantity he saw coming from it at that time would fill a two-inch pipe, more or less. It was shown, however, that the screening device was such that when in motion a small quantity such as that testified to by the witness might momentarily escape along with a large bunch of leaves or other like material, and a large number of witnesses were called who passed by the spout of the trommel screen that morning at seven o'clock who testified that no water was coming from it. The flume tender testified that he was there at ten minutes after seven, that no water came from the spout; the track watchman said he was there at half past eight and no water was coming from the spout; another passerby testified that he was there about half past ten, and the superintendent of the com-

pany was there at about ten minutes to eleven. He testified that at that time everything was operating perfectly and no water was coming from the rubbish pile.

The mass slid down the hillside at about fifteen minutes after eleven. Shortly before that it had started to move and had brought the wires of the Alaska Gastineau Company into contact with those of the plaintiff in error in the manner claimed by the plaintiff in error. Flashes were observed on the hillside at a point where the wires crossed, the voltage chart kept on the system recorded a short circuit referred to and the testimony of witnesses established the fact that the short circuit occurred and that the power line supplying current to the trommel screen motor had gone out some five or ten minutes before the mass fully slid down the hillside. After this, the power line had gone out, as above stated, which was evidenced by the fact that the trommel screen stood still and the electric lights in the tunnel connected on this same system had been darkened. Men coming from the mine and passing this trommel screen encountered a quantity of water flowing over the screen and following the trail leading along the hogback in the direction of the slide area; others from other points of view observed water coming from this spout at the same time. The only evidence in the case that in any sense tends to prove that any water came from the diverting works of the plaintiff in error prior to the time when the ground began to move and interfere with the sup-

ply of electric current by which the motor was driven, as before stated, was the evidence of a single witness, Buzzby, who said he saw a quantity of water that would fill a two-inch pipe, more or less, coming from the spout, a quantity so small that it could not have any effect and the presence of which so observed by Buzzby at that time was amply explained by the obvious fact that such small quantities might from time to time splash over and be thrown out with the leaves and rubbish.

That this was the case is clearly evident from the fact that a large number of others passing there at about that time saw no water coming from the spout and that no water was coming over at the different times in the forenoon when the various witnesses before mentioned had occasion to visit that point.

In addition to this it may be claimed that the plaintiff produced a number of witnesses, who, as above stated, testified that they saw a quantity of water from the streets of Juneau, but that they were mistaken in the stream they testified to was made very evident; that many others who afterward learned their mistake also made the same mistake, and from the further fact that the stream they described in cross-examination was such in appearance that it could not have come from the rubbish spot at the trommel screen. However, some of these witnesses made the statement that the stream they saw came from the penstock, and to this extent, and

no further, does their testimony supply conflict of evidence upon the question of whether water was coming from the penstock prior to the time that the ground began to move. If, however, it should be said that this is a sufficient conflict in evidence to submit to the jury as to whether there was water coming out of the diverting works from the plaintiff in error prior to the time the ground began to move, it is claimed by the plaintiff in error that there is no conflict whatever upon the question of how and what caused the water to come from the penstock.

The specific act of negligence charged was that more water was brought to the penstock by the flume than the pipe leading from the penstock was able to carry away; that as a result of this the penstock overflowed; that a series of spillways should have been installed to take the water from the flume before it reached the penstock, and that a waste flume should have been installed to carry away the water that was so allowed to overflow.

The evidence conclusively showed that three pipes led from the penstock; that these three pipes had a carrying capacity twice as great as that of the flume and that it was wide open and carried the water and allowed all the water that would flow through it to empty into the mill tank, so that it would be impossible for the flume to carry to the penstock as much water as the pipe would carry away. No evidence was offered at the trial that tended to show

in any manner that more water was carried to the penstock than the pipe had or could carry away; on the other hand, it was conclusively shown that such was not the case, but that the overflow which had occurred from the rubbish spout occurred because the screen had stopped so that its meshes filled up and allowed the penstock to overflow.

There was no claim and no evidence that this screen, installed and maintained as it was, was not an official device; in fact, it was admitted by at least one of the engineers called by the defendant in error that it was the most perfect device known for that purpose and could not overflow as long as it was kept revolving.

It was also conclusively shown that the penstock referred to was not the character of device usually denominated a penstock; that is to say, it was not a device installed for the purpose of equalizing the flow and putting a uniform pressure of the water in the pipe. The pipe in this case was shown to be merely a part of the carrying system that carried the water from the point of diversion in the creek to the mill tank, which served the purpose that a penstock usually serves, of equalizing and regulating the flow and the pressure. It was shown that at the mill tank, where the pressure was regulated, a suitable overflow device was maintained and the overflow water was carried away by a waste flume. No waste flume was installed or maintained to carry away the leaves or rubbish that came from

the rubbish spout, and many engineers testified that the waste flume could serve no useful purpose if maintained at that point. Witnesses were called, however, by the defendant in error, who testified that the penstock should be provided with waste flumes, but at least one of their expert witnesses, Mr. Crowther, testified that where a penstock served no purpose except the purpose of the penstock in question, that is to say, that where the pipe leading from it was larger than the pipe leading into it, and the penstock was kept one hundred per cent open, there would be no occasion for a waste flume.

The point is made, therefore, on the question to direct a verdict, that as long as there was no evidence to show that the pipe leading from the penstock had a carrying capacity less than the flume leading into it and no evidence to show that more water was conveyed to the penstock than the pipe did or could carry away and the evidence conclusively made it appear that such was not the case, but that the overflow, whatever there was, was due to another and different cause not alleged in the complaint nor referred to in the bill of particulars.

There was no evidence of the negligent acts complained of, especially in view of the fact that the evidence conclusively showed that the devices installed were the best that could be procured.

Another point raised by the motion to direct a verdict deals with the question of injury and re-

sulting damage. It is claimed that there was no evidence that any of the articles of property enumerated in the bill of particulars were injured or destroyed in the landslide and no evidence from which the jury could assess the damages. The evidence in the case claimed to have some bearing upon this question will be set up and referred to in detail when that point is discussed in the argument.

This last named question is not only the principal question raised by the motion to direct a verdict, but also the principal point relied upon for reversal herein.

Errors Assigned and Relied Upon for Reversal.

1. That the evidence is insufficient to justify the verdict.

2. That the court erred in denying defendant's motion for a directed verdict made at the close of the case, after the evidence on behalf of both parties had been adduced, submitted and closed, for the reasons stated in said motion, which is incorporated in the Bill of Exceptions and which will be more at length referred to hereafter.

3. That the court erred in instructing the jury as follows:

"If your verdict should be for the plaintiff, it should be for such sum as you may find from the evidence he has been damaged, as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money."

To which portion of the court's charge the defendant excepted on the ground that there was no evidence under which the jury could assess damages, there being no evidence of market value, nor evidence of the extent of the loss or damage, if any, sufficient for the jury to assess damages.

4. That the court erred in refusing to instruct the jury to bring in a verdict for the defendant.

5. That the court erred in overruling the motion for a new trial.

6. That the court erred in entering a judgment.

Argument.

A discussion of the second error assigned will present to the court the points sought to be presented. The other errors assigned merely raise the same questions in a different manner. At the close of the case a motion was made to direct a verdict.

The motion to direct a verdict was based upon several grounds, among others the grounds that there was no evidence of the negligent acts complained of in the complaint; that the evidence showed that the slide referred to in the complaint was not occasioned by any act or acts of the defendant in error; and that it was conclusively shown that if water coming from the diverting works of the plaintiff in error reached the slide area, this was not due to the negligence of the plaintiff in error, but to independent intervening causes.

Another ground presented by the motion to direct a verdict raised the point that there was no evidence of injury to the articles of property enumerated in the complaint and no evidence of the value of these articles upon which the jury could base a verdict.

In connection with the first point made, it will be observed, as stated in the Statement of Facts, that *the specific act of negligence charged was that the plaintiff in error permitted more water to flow into its penstock than the distribution pipe was able to carry away*, and that for that reason the water overflowed the penstock; that a series of spillways should have been maintained to keep so great a flow of water from coming to the penstock; and that a flume should have been constructed to take care of the overflow water.

The whole theory of plaintiff's case was based upon the fact that this penstock was the ordinary penstock that served to regulate the flow in the service pipe and control the pressure. That being the case, of course, water could back up in the service pipe and overflow the penstock itself, and, in cases of such a penstock, an overflow pipe or flume would be a proper device to employ to take care of the surplus water.

The evidence, however, did not tend to show that any such situation existed. There was no evidence whatsoever that the water backed up in the service pipe or that the service pipe was unable to carry away all the water deposited by the penstock or

flume. No witness testified to any such statement of facts and no evidence was adduced from which such condition of affairs could be surmised.

The uncontradicted evidence at the trial was that the service pipe, so-called, was approximately twice as large as the flume, that is to say, had a carrying capacity approximately twice as great as that of the flume; the penstock was not employed to regulate the flow in the service pipe, but was a mere device employed to get the water out of a square container, a flume, and into a round container, a pipe, and was simply a part of the carrying system. That the pipe emptied into the mill tank, which in fact was the penstock in the sense that it regulated the flow, and it was equipped with all the necessary overflow devices and waste flumes.

See evidence Bradley, record p. 575;

See also Dudley, record pp. 71 and 72.

There was, however, in the penstock a revolving screen, installed there for the purpose of screening the rubbish and debris from the water before it entered the pipe. This revolving screen was driven by an electric motor, and a sheet iron spout was installed to carry the debris screened from the water to the outside of the penstock. The device so installed was of such a character that no water could flow over it and out of the sheet iron spout unless the meshes became so clogged as to permit this, and this was not possible as long as the screen was kept in motion, as it was so constructed that it would

automatically clean itself and permit the water to flow through the meshes.

Not only are the engineers of plaintiff in error agreed upon this point, but Mr. Dudley, an engineer called by the defendant in error, testified as follows:

“Q. And if you had a screening device that was so built—8 feet long—and driven by the safest power that can be had, and revolving, there would be no reason to anticipate that that thing would ever get clogged, would there?

A. Unless something happened to the motive power.

Q. Unless something happened to the motive power it would not stop?

A. No, sir.

Q. And as long as it kept running there would be no possible chance for the water to get out of it?

A. No probable chance.

Q. The only thing that would come out of it would be the leaves and the moss?

A. Yes, sir; under ordinary working conditions.”

See evidence Dudley, record p. 82.

Now, what actually did happen was this: Shortly before the landslide referred to in the complaint there was another and different landslide in a gulch at a point above plaintiff in error's flume line, the effect of which was to permit the leaves and rubbish from the gulch in which the slide occurred to find their way into plaintiff in error's flume, so that the water flowing therein became heavily charged with leaves and moss.

This fact is set up in the answer and not denied in the reply and was upon the trial established by

uncontradicted proof. (See evidence Kelly, record p. 807.)

There was no evidence tending to show that the screen had stopped until about the time the solid mass was precipitated down the mountainside. A number of the witnesses testified that the screen was in motion and that no water was coming from it during the forenoon.

See evidence Smith, record p. 812;

See evidence Johnson, record p. 184;

See evidence Newman, record p. 831;

See evidence Dowling, record p. 793;

See evidence Kelly, record p. 806;

See evidence Tielins, record p. 781;

See evidence Richards, record p. 641.

Just prior to the time that the mass came down the hillside, two men, Johnson and Newman, came through the tunnel immediately above the penstock, and as they passed through there, observed that the lights in the tunnel were out, indicating that there was no electric current upon the circuit by which these lights were fed. The lights in the tunnel were on the same circuit that supplied power to the trommel screen motor, and when these men reached the trommel screen, they found that it was standing still, and that a stream of water was flowing over it and out of the discharge spout designed to carry away leaves.

It is claimed by the plaintiff in error that the power went off from this circuit a few moments be-

fore this, because of the fact that the mass, which shortly afterwards slid down, had already moved sufficiently to set the tower of the Gastineau Company in motion and cause the wires strung thereon to insulate and come in contact with the wires of the plaintiff in error three times in reasonable quick succession, thereby causing three short circuits on plaintiff in error's line, which had the effect of throwing out feeder No. 15, which was the circuit from which the trommel screen and the lights in the tunnel were supplied by electric current.

Flashes were seen on the hillside as the wires were brought in contact (see evidence Cook, record p. 751), and the result that short circuits were registered on the voltage chart kept in the power house of plaintiff in error, Exhibit 11, and were observed by the electrician in charge, who also testified that the effect of these three short circuits was to throw out circuit No. 15, a matter of five or ten minutes before the landslide happened. (See evidence Bausman, record p. 910.)

Of course, if the screen stopped at the time the wires were thus brought in contact, and the system short-circuited, it would soon overflow because of the fact that the water was heavily charged with rubbish brought into the flume by the slide above the flume line previously, and it is claimed by the plaintiff in error that this is what happened. There is no evidence in the record that the screen stopped before this time. Many witnesses above referred to testified that it was running at various times in the

forenoon, and Mr. Richards, the company's superintendent, testified that he was there at about ten minutes before eleven, less than half an hour before the slide, and the screen was then in motion and functioning properly.

The plaintiff in error's position, therefore, that the screen came to a stop because of a short circuit occasioned by a contact of its wires with those of the Gastineau Company, which in turn were set in motion by a movement of the solid mass, is established by the uncontradicted testimony in the case, and as already stated, there was no evidence whatsoever to show that more water came into the penstock than the service pipe carried away, or that any water overflowed the penstock at all from any cause whatsoever. It being established by the uncontradicted proof that whatever water came from the penstock at any time flowed out on this rubbish spout because the meshes of the screen were so clogged as to permit a portion of the water discharged from the flume to flow over the screen instead of through it—a condition that could not happen unless a screen was stopped, and as already stated, the screen did not stop until the mass had already started to move and brought about the conditions which caused the screen to stop.

Now, the act of negligence charged is not that water overflowed the screen for any reason, but that water overflowed the penstock, because more water was brought to it than the service pipe could carry

away, and it was alleged that spillways should have been maintained to relieve the pressure upon the flume to prevent this situation from arising, and that a waste flume should have been installed to carry away the water that would thus be caused to overflow.

No evidence was introduced to show that there was an absence of necessary spillways—of course, there could not be such evidence in the face of the fact that there was no evidence that there was a surplus of water which the pipe could not or did not carry away.

The evidence did show that there was no waste flume designed to carry away overflow water coming from the penstock, but in the absence of evidence tending to show any of the negligent acts charged as responsible for the overflow, it would be entirely immaterial whether there was a waste flume there or not. This would be true even if there were no other evidence upon the subject. But aside from this fact that plaintiff in error's engineers all agreed that a waste flume could serve no useful purpose if installed at this point (see evidence Bradley, record p. 572; evidence Metzger, record p. 687; evidence Richards, record p. 649), the reason for this being that no water would be expected to come from this spout designed to discharge the leaves, and that if water did come from it, it would drain down the gulch where it could do no harm to any one.

Mr. Dudley, defendant in error's engineer, agrees with the engineers of the plaintiff in error that the

natural flow of water coming from this spout, if any water should come from it, would be down the gulch where it could do no harm. After testifying that he had traced the flow from the spout of the penstock down the hog back by observing leaves and small sticks that had been deposited by the water as it flowed, he testified that the water followed a trail over the top of the ridge in the direction of the slide area—that it entered the trail 50 or more feet below the spout and remained within the trail until the slide area was reached. Mr Dudley's testimony is as follows:

“Q. Now, that trail, Mr. Dudley, runs right over the center of the hog-back, doesn't it—that is, approximately?

A. Approximately, yes.

Q. It slopes from both sides—the hog-back slopes down in both directions, does it not—in a northerly and southerly direction from the trail?

A. Yes, sir.

Q. There is a gulch on the northerly side of the trail and a gulch on the southerly side—that is true, isn't it?

A. Yes, sir.

Q. Now, the natural drainage of water coming from that spout, if it were not for that trail holding it, would be in the direction of either one or the other of those gulches, would it not?

A. Unless something interfered with it, yes.

Q. If there were nothing on the ground to keep that water right on that hog-back it would run in one direction or the other, wouldn't it?

A. Yes, sir.

Q. It would immediately as it left the spout find its way to the lowest level of one gulch or the other?

A. Yes, I would say that is true.

Q. And the only reason it flowed over the hog-back was because there was a trail there for it to run into—that is right, isn't it?

A. It would never have gotten into the trail unless something threw the water into the trail—having found the trail, it followed the trail.

Q. There might have been a sand bank, or something like that.

A. Yes.

Q. But had there been no sand bank it would never have reached the trail, would it,—the natural drainage would have taken it one way or the other?

A. Probably so."

See evidence Dudley, record p. 52 and again on p. 67.

After testifying that in his opinion it would have been a proper precaution to have built a waste flume below the spout, Mr. Dudley testified as follows:

"Q. Now, Mr. Dudley, referring to the matter that Mr. Roden just referred to, where would you lead that flume to?

A. Right into Portal Gulch.

Q. Into Portal Gulch?

A. Yes; that is the natural place for it.

Q. Then the water would run down Portal Gulch, wouldn't it?

A. Yes, sir.

Q. Would that be a safe place?

A. For all I can see, yes.

Q. That would be a safe place?

A. Yes; a natural drainage channel; yes, sir.

Q. If you were to build that flume, you would build it from the spout to Portal Gulch?

A. Yes, sir; or near there.

Q. Now, if there was no sand on the ground or anything else, you have testified that the water would naturally run into that gulch, haven't you—if there were no obstructions?

A. If there were no obstructions."

In view of the testimony of Mr. Dudley upon this question, it is, of course, not necessary to burden the court with the testimony of the various engineers called by plaintiff in error, who testified that the natural drainage from the bottom of the spout was down Portal Gulch, and the testimony of plaintiff in error's expert witnesses upon the other question that no flume such as has been referred to could serve a useful purpose in connection with the maintenance of this particular kind of a penstock was further corroborated by Mr. Crowther, another engineer called by defendant in error who testified upon cross-examination, as follows:

"Q. Yes, equalizing the flow, but let us go a little further. Now, assuming that this penstock is as I have indicated, that is to say, that the service pipe flowing from the penstock has a greater capacity than the flume, and the service pipe is kept open so that the flow is continuous, there would be no occasion for an overflow arrangement at the penstock, would there?

A. No; providing that your use of the term open means one hundred per cent operation in your service pipe.

Q. Yes; exactly—that is what I mean. I am assuming that the carrying capacity of the service pipe is larger than the carrying capacity of

the flume, and that the service pipe is not obstructed—that it is entirely open, there would not, under those circumstances, be any occasion for an overflow at the penstock—would there?

A. No, there would not.”

See evidence Crowther, record pp. 127-128.

This then leaves the case in this situation:

There was no evidence that more water was conveyed to the penstock than the service pipe could or did carry away. There was no evidence that the water backed up in the service pipe and overflowed the penstock. On the other hand, the evidence was conclusive that this did not occur. There was evidence that there was no overflow flume to carry away the water that did overflow the trommel stream, but the evidence also conclusively shows that the reason the water flowed in the direction of the slide area, whatever water did flow in that direction, was not due to the absence of a flume, but was due to other causes. Under natural conditions, if there had been no other causes, the water would have flowed down Portal Gulch, its natural line of drainage, along the same course that it would have taken had a flume been constructed under Mr. Dudley's direction. The reason it did not follow this course on this occasion was due to the fact that its flow was deflected by a sand bank or some other obstacle as was shown by the testimony of Mr. Dudley, whose testimony upon this point is in entire accord with a number of plaintiff in error's engineers, with the details of whose testimony it will

not, of course, be necessary to burden the court in view of Mr. Dudley's position as a witness on behalf of defendant in error. Nor would it flow down the hog-back in the direction of this slide area, had it not been for a trail which ran along the hog-back in which the water flowed.

Now, it is not charged that plaintiff in error was negligent in permitting a sand bank, snow bank or other object to deflect the course of the stream coming from the penstock spout so that it did not follow its natural drainage into Portal Gulch. Nor is there any evidence on that point. Nor is it charged that the plaintiff in error was responsible for the existence of the trail which carried the water along the course of the hog-back. Nor is there any proof upon that subject.

The situation then is that the water which came from the penstock did not come from it because of the negligent acts charged, and did not flow in the direction of the slide area because of any negligent act charged, even though it should be conceded that water actually flowed from the penstock prior to the slide—a point upon which there is no evidence in the record as we have indicated in our statement of facts—except the bare statement of some witnesses who saw a stream of water coming from the flume level, which, when described by them was clearly nothing more than a stream of surface water, which was carried over the top of the flume, a short distance to the south of the penstock and allowed to drop back down into the gulch and flow down its natural channel.

Although some of these witnesses did testify that the water they saw came from the penstock and it is this bare statement of these witnesses to the effect that the water they saw came from the penstock that must be relied upon to create a conflict of testimony upon this point, and this as has already been stated, in spite of the fact that they described a stream that could not come from the penstock but was nothing more or less than the surface water above referred to.

To this must be added the further statement that the trommel screen was installed in April, 1918. (See evidence Higgins, record, p. 862.) Prior to that time a flat screen had been used at that point, but it was found that the flat screen occasionally clogged up and overflowed, and for that reason the revolving screen which cleaned itself and was the most efficient device known for that purpose, was installed. (See evidence Bradley, record, p. 571.)

At the time this installation was made, the plaintiff in error did not have in stock a motor of the type and size required. An order for the necessary motor was at once sent in. This was during the war and there was some delay in getting delivery of the required motor. In the meantime, a 3 H. P. motor which the company had on hand was installed. This was a 3-phase motor, operating on a single phase circuit. (See evidence Higgins, record, pp. 863-870 and 871.)

During the time this improvised motor was in use, a period of eight or nine months, some difficulty was

experienced in connection with its operation. The screen stopped on several occasions, and on some occasions it overflowed. (See evidence Higgins, record, p. 871.)

About a year before this slide, the required motor arrived and was installed. Mr. Higgins, after testifying that the 2 H. P. motor arrived, testified as follows:

“Q. What did you do in the way of installing that?

A. We installed it as soon as we got it.

Q. How long before the slide was that?

A. Well, we installed that motor along in January of 1919.”

Mr. Higgins then tells of two other occasions when the motor had been stopped because of repair work or other activities by the employees on the system, but testifies that since the time of the installation of the new motor, the screen had not stopped a single time because of any defect or failure of the new motor to operate. Nor had it stood still for any cause whatsoever since July or August of 1919. His testimony upon that point is as follows:

“Q. When was the last time that you had any trouble with it?

A. The last time was in July or August, 1919.

Q. Since you put in the new motor, the 2 H. P., 3-phase circuit motor, did you have any trouble with the motor, that was the fault of the motor itself?

A. No, sir.

Q. Did you have any trouble with anything except outside disturbance that you have explained?

A. No, sir."

(See evidence Higgins, record, page 875.)

Now, the evidence showed that on such occasions as the course taken by the water was observed when this overflow occurred, it drained in the direction of Portal Gulch, along the natural line of drainage, and there is no evidence that the water coming from the trommel screen on these previous occasions caused any landslide or did any other damage whatsoever. The fact that water coming from the screen on these previous occasions did no damage, coupled with the fact that the screen had been in successful operation without the slightest difficulty or disturbance for many months prior to the slide, in fact, ever since the improvised motor had been replaced by the new motor, would seem to establish, even if standing alone, that there was no negligence in connection with the installation or maintenance of the devices employed.

The outstanding feature of the case, however, is that landslides had occurred at intervals on the hillside in this immediate vicinity ever since the town of Juneau was in existence (see evidence Saum, record p. 822 et seq.—evidence Goldstein, record p. 215), that there were six other landslides in the immediate vicinity of the place where the slide, which is the subject of inquiry, occurred during the wet spell that existed at that time. Four

of these landslides occurred on the same forenoon—one was at Woods Gulch, to which reference has already been made (see evidence Kelly, record p. 807); two others were above the flume line of the plaintiff in error at points further up (see evidence Dowling, record p. 794); another slide of great magnitude occurred right opposite the Ebner Mine at about the same moment that the slide now being inquired into occurred (see evidence Oswell, record p. 567); another slide occurred at Salmon Creek, a short distance away above the flume of the Gastineau Company, either that day or the following day (see evidence Jackson, record p. 676). Still another slide occurred within a few yards of where the slide referred to in the complaint took place within a few days after it happened, but during the same wet spell.

Now, while it is true that any man whose mind had been disciplined by science would, without hesitation, relate all these landslides to the same cause, it is, of course, equally true that the jury had the right to find that all the other slides were the result of natural causes, that is to say, the rain melting snow, and that this slide alone was due to the negligent acts of the plaintiff in error. But it would seem that before a verdict based upon such conclusions of fact could be sustained, it should at least be supported by some clear and convincing evidence proving or tending to prove the specific acts of negligence charged in the complaint.

INJURY AND DAMAGE.

The second point we desire to urge why the motion to direct a verdict should have been allowed is that there was no evidence either of injury or damage upon which the jury could base a verdict. This point was made in the motion to direct a verdict, and, of course, also carries under each of the various assignments of error above set forth.

The allegations of the complaint relating to the damage sustained are as follows:

That the said store building on lot one was damaged in the sum of \$1500.00.

That plaintiff's stock of merchandise in his said store and warehouse was destroyed in the amount of \$2500.00.

That the said warehouse was of the value of \$1500.00 and was utterly destroyed to the plaintiff's damage in the sum of \$1500.00.

That the said apartment house of plaintiff was of the value of \$8500.00, and was utterly destroyed in the plaintiff's damage in the sum of \$8500.00.

That the furniture and equipment of said apartment house belonging to plaintiff was of the value of \$2000.00 and was destroyed to plaintiff's damage in the sum of \$2000.00.

That the aforesaid three rows of cabins, containing eleven apartments were of the value of \$3000.00 and wholly destroyed to plaintiff's damage in the sum of \$3000.00.

That the aforementioned store building on lot 2, was damaged in the sum of \$1000.00, and that the aforementioned premises on which said destroyed buildings were situated at the time and prior to said slide, were damaged in the sum of \$1500.00.

After the complaint was filed a Bill of Particulars was filed more specifically enumerating the articles of personal property referred to as destroyed or damaged in the complaint, which said Bill of Particulars was as follows:

“BILL OF PARTICULARS.

Comes now plaintiff and in compliance with the order of the court submits the following as his bill of the particulars, items of personal property referred to in his complaint and for which he claims damages, to wit:

General merchandise in store consisting of groceries, boots, shoes and clothing	\$1,500.00
Groceries in warehouse consisting of rice, bacon, hams, flour, beans, etc.....	1,000.00
Furniture and fixtures in apartment house:	
4 stoves at \$25.00.....	100.00
4 kitchen ranges at \$100.00.....	400.00
10 rugs at \$25.00.....	250.00
4 beds with springs and mattresses at \$40.00	160.00
4 tables at \$25.00.....	100.00
4 dressers at \$30.00.....	120.00
20 chairs at \$5.00.....	100.00
8 sets light fixtures at \$10.00.....	80.00
Kitchen utensils consisting of pots, pans and dishes.....	230.00
4 sets linoleum at \$25.00.....	100.00
4 bathtubs at \$35.00.....	140.00
4 sinks at \$15.00.....	60.00

4 wash-bowls at \$15.00.....	60.00
4 toilets at \$25.00.....	100.00
Total.....	<u>\$4,500.00</u>

A more itemized or detailed statement cannot be furnished by plaintiff."

There was no evidence adduced at the trial tending to prove that any of the property of the plaintiff was injured by the landslide complained of, or that the plaintiff suffered any damage. The only evidence that was presented with a view of establishing these facts was the testimony of the plaintiff Goldstein. After testifying that he was the owner of several lots situate on the slope of Mount Roberts and described in the complaint, Mr. Goldstein's testimony was as follows:

"Q. How had these lots been improved?

A. Where the store building is, there is a two-story building 36 by 50—2 stories high; and then there was a big shed in the back of that; and directly back of that was an apartment house 48 feet square, two stories.

Q. Have you made a list so that you would be able to tell the court and jury the value of these different pieces of property?

A. I have, as near as I can judge the value of them.

Q. Have you got that statement with you?

A. I have.

Q. You may use that in describing the different values.

A. You mean the value of the property or the value of the damages? I estimated the value of the damage done to the property.

Q. Give us the estimated damage.

A. The damage I consider done to the store building was \$1500.00.

Q. How did you arrive at that figure?

A. I estimated that value on it.

Q. What did you base that estimate on?

A. What it cost to do work at the present time, or did at the time of the slide.

Q. Have you made inquiries as to what it would cost?

A. I have made inquiries of different carpenters.

Q. Go ahead.

A. The damage to the stock in the store was \$2500.00.

Q. To the stock?

A. Yes, by water and mud—that was damage to the stock.

Q. How did you arrive at that figure?

A. Why, the amount of goods that was damaged and was lost, at the price goods was worth at that time.

Q. Go ahead.

A. Warehouse damages \$1500.00. I had to rebuild that.

Q. How much did it cost to rebuild it?

A. It cost me,—Well, it isn't finished yet. I have spent about \$700 on it so far, but it is just about half completed—haven't been able to finish it up.

Q. Go ahead.

A. The apartment house on the hill at \$8500.00.

Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I have had estimates from carpenters, what it would cost to rebuild that property; and there was fixtures in the apartment house, \$2000.00—there were four 5 room apartments. Three rows of cabins, \$3000; and damage to building on lot 2, block M—that is the building which the Russell gun store is in, which I own—figure it would cost \$1000 to rebuild that; and then damage to the lots on the hill \$1500.00.

Q. What is that real estate worth now?

A. It is worth,—well, I don't know—they are taxing me a hundred dollars for the lots at the present time—that is what the last assessment was.

Q. How much was the last assessment before the slide?

A. \$1500; and they assessed me a hundred dollars for the lots where the apartment house was.

Q. That is the city assessor?

A. The city assessor, yes, sir.

Q. What else did you lose at that time, Mr. Goldstein?

A. Well, I don't know.

Q. Have you given a complete list now of the items?

A. Outside of the furniture and fixtures in the apartment house—I had to itemize those.

Q. What was the furniture and fixtures worth?

A. The way I have it itemized, general merchandise in the store, consisting of boots, groceries, shoes and clothing, \$1500.00; groceries in the warehouse, consisting of rice, bacon, hams, flour, beans, etc., \$1000.00; furniture and fixtures in apartment house, 4 stoves at \$25.00, \$100.00; 4 kitchen ranges at \$100.00, \$400.00; 10 rugs at \$25.00, \$250.00; 4 beds with springs and mattress at \$40.00, \$160.00; 4 tables at \$25.00, \$100.00; 4 dressers at \$30.00, \$120.00; 20 chairs at \$5.00, \$100.00; 8 sets light fixtures at \$10.00, \$80.00; kitchen utensils consisting of pots, pans and dishes, \$230.00; 4 sets linoleum at \$25.00, \$100.00; 4 bathtubs at \$35.00, \$140.00; 4 sinks at \$15.00, \$60.00; 4 wash-bowls at \$15.00, \$60.00; 4 toilets at \$25.00, \$100.00.

Q. Makes a total of how much?

A. \$21,500.00.

Q. Is that a fair estimate and valuation of the property which you lost at that time?

A. I consider it fair, yes. I don't think it could be duplicated for any less than that.

Q. You say this property had been occupied since when?

A. The store building had been occupied since 1886—that is, the premises; the other had been occupied since 1913, I think that was the time it was built.

Q. Now, this place where you were living, I want to ask you if any of the adjoining property around the neighborhood had been occupied and improved any prior to the slide?

A. It sure had—the entire Front Street had been occupied for years back, as far as I can remember.

Q. How far back can you remember?

A. About 30 years.

Q. What damaged this property that you have enumerated here?

A. The landslide back of the buildings, coming from the top of the hill there.

Q. When did this happen?

A. January 2, 1920."

(See evidence Goldstein—record p. 206 et seq.)

And on cross examination, Mr. Goldstein testified as follows:

"Q. Mr. Goldstein, I think you stated before the store building which is there now,—that isn't the building that were there in 1886?

A. No, sir.

Q. It is a new building?

A. It is on the same lot.

Q. You had a store building there back in the early days and occupied it?

A. Yes, sir.

Q. And the property behind that, you put your improvements on in 1913, didn't you?

A. Either 1912 or 1913, I wouldn't say, for certain.

- Q. About that time?
- A. Yes.
- Q. And the valuation that the city placed upon that was \$1300.00, you say?
- A. No, I think it was \$1500.00, on that lot.
- Q. That is when the buildings were on it?
- A. No, sir, the lot.
- Q. On the lot?
- A. On the lot.
- Q. The buildings were on the ground the year before the slide, weren't they?
- A. Yes.
- Q. What was the valuation of the lot at that time?
- A. The assessed valuation?
- Q. Yes.
- A. I wouldn't say for certain—I don't remember what that was.
- Q. Approximately?
- A. I don't remember what it was,—I would have to look up the records to see.
- Q. You don't mean to say the lot was assessed at \$1500.00?
- A. It was valued at \$1500.00.
- Q. It was not assessed at that?
- A. No.
- Q. The comparison you have there now is the assessment that was made when the buildings were upon the lot?
- A. Yes, sir.
- Q. And it was assessed at \$100.00 after the slide?
- A. The bare lot was assessed at \$100.00.
- Q. And when the buildings were there it was assessed at \$1500.00 for the lot?
- A. For the lot?
- Q. Yes.
- A. No, sir, it was not.
- Q. Was the value of the house assessed separately?
- A. No, sir.

Q. Well, how did they separate the value of the house and the value of the lot?

A. He asked me what was the value of the lot and I told him, and then they put the value of the house and lot together.

Q. How much was that, do you remember?

A. I think it was \$4500 or \$5000 that was assessed at—I wouldn't say for certain.

Q. Did that include the store building?

A. No, sir.

Q. That was the property behind the store?

A. That was the apartment house.

Q. The store building was a separate proposition?

A. Yes, sir.

Q. The apartment house and the cabins were all on the same lot, weren't they?

A. No, they were not on that same lot.

Q. Weren't they on that same assessment?

A. No, sir.

Q. How much were the cabins assessed at?

A. I wouldn't say for certain—I think it was a thousand dollars but I wouldn't say for certain until I looked it up.

Q. How much was the store assessed at?

A. The building and the lot I think is \$5000.00.

Q. The items of damaged stock you had in there, do you remember what particular articles of merchandise were damaged? In the store,—not in the warehouse, now, but in the store.

A. I wouldn't say the particular items, no.

Q. Did you make a list of those things that were damaged, at that time?

A. I did not.

Q. And your estimate as to what the damage was is a mere estimate?

A. A mere estimate.

Q. You wouldn't be able to tell us now what that estimate consisted of—that is to say, what the articles were that were damaged?

A. No.

Q. You don't know whether it was tons or bulk?

A. I know it was all included in that. I don't know just the particular stuff I lost there—I don't know the articles—I know some of them, but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment \$1500.00?

A. I don't know whether it was \$1500—I read it off the list here.

Q. \$1500.00 is my recollection.

A. \$2500.00.

A. That \$2500.00, is that damage to the stock in the store?

A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done. I wouldn't come here on oath and testify how much damage was done because there is no way of figuring it up, because that stuff was going right out of the front door on to the beach, and I didn't stand there in the door and check it up as it went out of the store.

Q. You don't know what it was that went out at that time?

A. I do not, no, sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it—is that right?

A. I would not.

Q. And that is true of the other things you have spoken of?

A. It is.

Q. The stuff in the warehouse, you don't know just what that was?

A. I couldn't get into my warehouse for two weeks because the buildings were laying right on top of it.

Q. There was no way of getting at it, and you only estimated it?

A. Only estimated it.

Q. There was no way of telling except by giving your best judgment upon it?

A. Yes.

Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you say it did, or that you estimate it was worth at the time of the slide?

A. I estimate it was worth that at the time of the slide.

Q. It cost you less than that, didn't it?

A. I don't know whether it did or not,—I don't know what I did pay for it.

Q. The buildings, how much did they cost you?

A. I don't remember what that was either, but I know the apartment house cost me about \$8000.00.

Q. And as to the rest of the buildings, you don't know?

A. I don't know.

Q. When was the apartment house built?

A. 1913, I think it was,—1913 or '14.

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all the time?

A. Not all the time,—they were moving in and out of them all the time.

Q. Had been used as a building for rent?

A. Yes, sir.

Q. That included the plumbing and the plumbing fixtures, and everything like that?

A. Yes, sir.

Q. That took the plumbing fixtures in?

A. Yes, that is the plumbing fixtures,—

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and stuff like that?

A. Yes."

(See evidence Goldstein, record p. 210, et seq.)

No other evidence in any wise relating either to the question of injury or damage was offered or received.

The jury found a verdict for the plaintiff in the sum of \$18,275.00.

A motion for new trial was made, and the court having decided that there was no evidence whatsoever of any damage to the real estate and no evidence whatsoever of any damage to the three rows of cabins, the former item for \$1500.00 and the latter for \$3,000 (see court's opinion, record p. 1017), it was ordered that the motion for new trial be denied only upon condition that the plaintiff remit \$4500.00 of the amount of the verdict, which was accordingly done and judgment entered against the defendant for the balance.

1. The first item for which damage is claimed is to the store building on Lot 1, which it is alleged was damaged in the sum of \$1500.00. The only evidence touching the extent of the damage to this store building is as follows:

“Q. Have you made a list so that you would be able to tell the court and jury the value of those pieces of property?

A. I have, as near as I can judge the value of them.

Q. Have you got that statement with you?

A. I have.

Q. You may use that in describing the different values.

A. You mean the value of the property or the value of the damages? I estimated the value of the damages done to the property.

Q. Give us the estimated damage.

A. The damage I consider done to the store building was \$1500.00.

Q. How did you arrive at that figure?

A. I estimated that value on it.

Q. What did you base that estimate on?

A. What it cost to do work at the present time, or did at the time of the slide.

Q. Have you made inquiries as to what it would cost?

A. I have made inquiries of different carpenters."

(See evidence Goldstein, record p. 172.)

There was no evidence as to how, if at all, the store building was injured by the slide, what was the matter with the building, what had happened to it, what had to be done to repair it, what its market value was before the slide, what its market value was after the slide, in what respect the market value after the slide differed from its market value before the slide—if at all—whether the work which Mr. Goldstein estimated had to be done was on the roof or at the foundation; Mr. Goldstein does not say that he knew anything about the cost of the character of the work that was to be done of his own knowledge. He said he had consulted carpenters, but their statements would hardly be evidence, even if they had been included in the record; they might have been brought into court and called upon to testify under oath, but this was not done. There was no way in the world that the defendant could call witnesses to meet the testimony offered by Mr. Goldstein. He estimated the damages to a building, the injuries to which he did

not describe, as being \$1500.00. No witness could testify that his estimate was not correct, for the facts upon which it was based were not revealed. Had he testified as to how the store had been injured, witnesses might have been called to meet his testimony, but even then it would not be a question of making an estimate, it would have to be shown as to what parts of the building were damaged, what would have to be done to repair it, what this would cost, and these things would have to be done by parties familiar with the matters to which they testified. Mere guesses and estimates would not suffice.

The plaintiff in error was entitled to have a full disclosure of the situation made so that it on its part could produce evidence to show what the monetary damage consisted of, and it also had a right to have these matters submitted to the jury so that the jury might know the exact situation, know where and how and in what particulars the building was injured, if at all, so that they would be in a position to fix the damages, for it is the province of the jury, after all the facts have been placed before them, to determine what the damage had been.

All these facts were withheld and there was therefore nothing for the jury to pass upon.

Unsatisfactory, however, as may have been the evidence upon this particular item, it came nearer to being evidence than anything that was offered in relation to any of the other items.

2. The second item enumerated in the complaint is as follows: That plaintiff's stock of merchandise in said store and warehouse was damaged in the amount of \$2500.00. The testimony of Mr. Goldstein in relation to this matter was as follows:

“Q. Go ahead.

A. The damage to the stock in the store was \$2500.00.

Q. To the stock?

A. Yes, by water and mud—that was damage to the stock.

Q. How did you arrive at that figure?

A. Why, the amount of goods that was damaged and was lost, at the price goods was worth at that time.”

(See evidence Goldstein, record p. 207.)

On cross-examination the witness, referring to the item now under consideration, testified as follows:

“Q. The items of damaged stock you had in there, do you remember what particular articles of merchandise were damaged? In the store,—not in the warehouse, now, but in the store.

A. I wouldn't say the particular items, no.

Q. Did you make a list of those things that were damaged, at that time?

A. I did not.

Q. And your estimate as to what the damage was is a mere estimate?

A. A mere estimate.

Q. You wouldn't be able to tell us now what that estimate consisted of, that is to say, what the articles were that were damaged?

A. No.

Q. You don't know whether it was tins or bulk?

A. I know it was all included in that. I don't know just the particular stuff I lost there—I don't know the articles—I know some of them, but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment \$1500.00?

A. I don't know whether it was \$1500—I read it off the list here.

Q. \$1500.00 is my recollection.

A. \$2500.00.

Q. That \$2500.00, is that damage to the stock in the store?

A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done. I wouldn't come here on oath and testify how much damage was done, because there is no way of figuring it up, because that stuff was going right out of the front door on to the beach, and I didn't stand there in the door and check it up as it went out of the store.

Q. You don't know what it was that went out at that time?

A. I do not; no, sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes.

Q. You wouldn't testify that that was it or wasn't it—is that right?

A. I would not.

Q. And that is true of the other things you have spoken of?

A. It is.

Q. The stuff in the warehouse, you don't know just what that was?

A. I couldn't get into my warehouse for two weeks because the buildings were laying right on top of it.

Q. There was no way of getting at it, and you only estimated it?

A. Only estimated it.

Q. There was no way of telling except by giving your best judgment upon it?

A. Yes."

(See evidence Goldstein, record pp. 213-214.)

The foregoing is all the evidence relating to this item in any manner. There was no evidence tending to show what the slide did to these articles of merchandise, except that Mr. Goldstein said some were washed through the door by the mud and water. No one testified as to what the articles were that were damaged, whether they were good quality or of inferior quality; whether they were new and marketable or old and shelf-worn; whether they consisted of one thing or some other things. Not knowing what the articles were, of course no one could testify as to what their market value was, and no evidence was given upon this subject. Mr. Goldstein very frankly says that he merely gave an estimate of the damage done to his stock and would not swear to the correctness of it. Clearly, before the plaintiff had a right to ask the defendant to pay him damages, he should have been well enough satisfied in his own mind that he was damaged in a fixed amount to have been willing to make oath to that fact.

All there was here before the jury was the case of Mr. Goldstein that he was damaged in the sum of either \$1500.00 or \$2500.00, he didn't know which without consulting the list, and he very carefully informs us that this is a mere estimate, to which he is unwilling to make oath.

How could the plaintiff in error meet that sort of testimony? Other witnesses might have been called, to be sure, who could have testified as Mr. Goldstein did, but they did not know what the articles of property lost or injured were, and not knowing, they would venture a guess that they were less than what Mr. Goldstein guesses they were worth.

The measure of recovery in a case of this character could be nothing other than the market value plus the interest.

Under this evidence the jury could not determine in the first place what articles, if any, were injured, nor was there the slightest evidence of what the market value of these articles was.

3. The third item enumerated was "Damage to warehouse, \$1500.00". The only evidence as to this item was as follows:

Mr. Goldstein testified:

"Q. Go ahead.

A. Warehouse damages, \$1500.00; I had to rebuild that.

Q. How much did it cost to rebuild it?

A. It cost me—well, it isn't finished yet. I have spent about \$700.00 on it so far, but it is just about half completed. Haven't been able to finish it up."

4. The fourth item enumerated was "Damage to apartment house, \$8500.00". As to this item Mr. Goldstein testified as follows:

“Q. Go ahead.

A. The apartment house on the hill at \$8500.00.

Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I had estimates from carpenters what it would cost to rebuild that property.

Cross-Examination.

Q. You had a store building back in the early days and occupied it?

A. Yes, sir.

Q. And the property behind that you put your improvements on in 1913, didn't you?

A. Either in 1912 or 1913, I wouldn't say for certain.

Q. About that time.

A. Yes.

Q. The buildings, how much did they cost you?

A. I don't remember what that was, either, but I know the apartment house cost me about \$8000.00.

Q. The rest of the buildings you don't know?

A. I don't know.

Q. When was the apartment house built?

A. 1913—I think it was 1913 or 1914.

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all of the time?

A. Not all the time; they were moving in and out all of the time.

Q. Had been used as a building for rent?

A. Yes, sir.

Q. That included the plumbing—the plumbing fixtures and everything like that?

A. Yes, sir.

Q. That took the plumbing fixtures in?

A. Yes, that is the plumbing fixtures.

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and the stuff like that.

A. Yes."

In regard to item number four, W. B. Hargraves, having testified as to the time he made a survey, and that he was familiar with the conditions on the ground as they existed on January 7, 1920, and being interrogated in regard to what was shown on exhibit marked Defendant's Exhibit No. Two, testified as follows:

"Q. Just enough to move it off its foundation. There is a line marked there 'Gastineau Avenue'—what does that indicate?

A. That indicates a portion of Gastineau Avenue below the slide or Gold Street.

Q. The line marked Franklin Street indicates Front Street, doesn't it?

A. Yes.

Q. The buildings between Gastineau Avenue and Front Street that you have indicated there, what does that indicate?

A. Indicates buildings as they were before the slide as near as I can get the information, and the real black ones—they were there at the time I surveyed the ground with the exception of one; one has since been torn down.

Q. The two buildings in black lines, they were there at the time you made your survey?

A. Yes.

Q. When was that?

A. May 21st.

Q. What is this little building about the black line?

A. That is still there.

Q. Do you know what that was?

A. A little shack.

Q. What is the other one, down below that?

A. It appears to be a series of shacks or apartments, a long row of buildings.

Q. That is one of the Goldstein apartment houses.

A. So I understand.

Q. These buildings in the dotted lines—what do they indicate?

A. Indicate buildings that were there before the slide.

Q. Those were buildings that were there before the slide?

A. Yes.

Q. How did the slide affect this little building?

A. As far as you can tell it didn't affect it at all.

Q. And it did affect the other one below the apartment house?

A. As near as I can tell it moved it three or four feet. There is a big stump that holds the corner of it—that stump is still there that protected the building.

Q. Was that building damaged very much?

A. It didn't appear to be.

Q. The other little building is still there?

A. Yes, the other little building is still there.

Q. And the others you have marked in dots they were demolished by the slide?

A. They were damaged considerable.

Q. The other in the black square down on Franklin Street—what does that represent?

A. That represents the lower Goldstein store building.

Q. That is the present store that is still on the ground?

A. Yes, sir."

5. Concerning item number five, the only evidence is that of Mr. Goldstein, as follows:

"Q. Go ahead.

A. The apartment house on the hill, \$8500.00.

Q. How did you decide on that?

A. * * * And there was fixtures in the apartment house, \$2000.00.

Q. Have you given a complete list now of the items?

A. Outside of the furniture and fixtures in the apartment house; I had to itemize those.

Q. What was the furniture and fixtures worth?

* * * * *

A. Furniture and fixtures in apartment house:

4 stoves at \$25.00.....	\$100.00
4 kitchen ranges at \$100.....	400.00
10 rugs at \$25.00.....	250.00
4 beds with springs and mattresses at \$40.00	160.00
4 tables at \$25.00.....	100.00
4 dressers at \$30.00.....	120.00
20 chairs at \$5.00.....	100.00
8 sets light fixtures at \$10.00.....	80.00
kitchen utensils, consisting of pots, pans and dishes.....	230.00
4 sets of linoleum at \$25.00.....	100.00
4 bath tubs at \$35.00.....	140.00
4 sinks at \$15.00.....	60.00
4 wash bowls at \$15.00.....	60.00
4 toilets at \$25.00.....	100.00

Cross-Examination.

Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you said it did or that you estimate it was worth at the time of the slide?

A. I estimated it was worth that at the time of the slide.

Q. It cost you less than that, didn't it?

A. I don't know whether it did or not. I don't know what I did pay for it.

Q. The buildings—how much did they cost you?

A. I don't remember what that was either, but I know the apartment house cost me about \$8000.00.

* * * * *

Q. That includes the plumbing and the plumbing fixtures and everything like that?

A. Yes, sir.

Q. That took in the plumbing fixtures?

A. Yes, that is the plumbing fixtures.

Q. I don't mean furniture, I mean plumbing fixtures, bath tubs and stuff like that?

A. Yes."

Besides this there were general answers relating to all the damage, as follows:

On direct examination, after the plaintiff had testified as to the foregoing, he was asked:

"Q. Makes a total of how much?

A. \$21,500.00.

Q. That is a fair estimate and valuation of the property which you lost at that time?

A. I consider it fair—yes. I don't think it could be duplicated for any less than that."

And on cross-examination:

"Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it—is that right?

A. I would not.

Q. That is true of the other things you have spoken of?

A. It is."

Argument.

The errors assigned raise the question of the sufficiency of the defendant in error's testimony on the

amount and extent of damages. The damages claimed by the defendant in error consist of injury to buildings, and for loss or injury to a stock of goods, and furniture and fixtures.

As to the measure of damages for injury to buildings there seem to be three rules for ascertaining the amount.

First—The difference in value of the land with the buildings before and after the injury.

Second—The diminution in fair and reasonable value of the building.

Third—The cost of repair.

Sutherland on Damages, Third Edition, page 2967;

Thompson on Negligence, Volume Four, page 1262;

Sedgwick on Damages, Section 170.

In the case at bar no one of these rules seem to have been followed. There is no evidence offered to bring it within the first rule, since there is no evidence of the value of the land, together with the buildings, either before or after the injury.

Under the second rule it would be necessary to show the condition of the buildings before and after the injury and place all the facts in relation thereto before the jury so that the jury could form an opinion as to the amount of diminution. Under this rule it might be proper to prove the original cost of the buildings injured or destroyed provided the facts as to its condition before and after the injury

were also shown to the jury. The cost alone would not be sufficient unless the buildings were totally destroyed and were new and had not been depreciated by use or time.

Likewise under the third rule the cost of repairs can be considered, but the facts as to the condition of the building before the injury and after the repairs are made must also be placed before the jury, so that these facts may be considered together with the cost of repairs.

In the case at bar the evidence consists of mere estimates placed upon the injury or loss by the person interested and by him alone, and these estimates or opinions stand alone and are not supplemented by any facts.

The measure of damages for the loss of the stock of goods would be the fair market value of the goods in Juneau—what they would bring in Juneau at the time of the loss; that is to say, the price that was being paid by the public generally when they were purchasing like merchandise. The same rule would apply to the household goods, provided that household goods were freely traded in at the time and place, and since there is no evidence in the record to the effect that household goods of like character were not freely traded in in Juneau, and that there was no market value for the same, we must presume that there was a market value. In any event the evidence as relating to the merchandise lost or injured was given as a mere guess with-

out furnishing any facts or data in regard to the same. No inventories were offered of the stock of goods taken before or after, or before and after, nor was there any data whatsoever furnished as a basis for the estimates made.

In the case of the furniture and fixtures in the apartment house, a list of articles was furnished. The testimony is, that it was estimated on what it was worth at the time of the slide. How this estimate was made—whether it was from market value or whether the furniture had a particular value to the owner the record does not show. The testimony shows that the apartments were built in 1913 or 1914 and that the witness does not know whether or not the original cost of the furniture and fixtures was more or less than the amount of the estimate. The testimony further shows that the fixtures, consisting of bath tubs, sinks, toilets and wash bowls, had been included in the cost of the apartment house.

In *Illinois Cent. R. Company v. Elliott*, 82 S. 585, the plaintiff recovered a judgment for injury caused by water escaping from defendant's tank which damaged plaintiff's house.

In regard to damages the court say:

“The measure of damages to the real property is the difference between the value of the property immediately prior to and immediately after the injury * * *.”

“The oral charges of the court excepted to:

“The measure of damages, if you find for the plaintiff in this case, would be the differ-

ence between the value of the house and lot just prior and the value of it just after the injury, and whatever the injury was to the goods, wares, merchandise and property contained in the house, and whatever the proof shows it cost to repair the house after the injury', was erroneous. Had the last clause, 'and whatever the proof shows it cost to repair the house after the injury', been omitted, the charge would have been free from error."

In *Byrne v. Combria & Company Ry. Co.*, 68 Atl. 672, an action for damages to mill, \$2000.00, and for future damages, \$2000.00. Verdict for \$3365.83. Plaintiff and another estimated these damages in a lump sum of \$4000.00, to which defendant excepted. The court say:

"The general rule is thus stated in 12 Am. & Eng. Ency. of Law, 2nd Ed., 460, 461: 'On damages, as on other subjects of expert opinion evidence, the opinion of witnesses must not be speculative or conjectural, but must be based upon facts or conditions existing and proved. Thus in any action of that kind the plaintiff cannot answer naked questions as to the amount of damages sustained by him.' And in 3 Elliott on Evidence, Sec. 2006, we find the statement that: 'The authorities with few exceptions are agreed upon the proposition that witnesses cannot give their opinion as to the quantum of damages in any given case. * * * The general rule is that witnesses must state facts and are not permitted to give their opinion on such facts. Nor can they give inferences or deductions drawn from them. These rules apply almost without exception to the granting of damages resulting from any act. So the rule is that a witness cannot be examined in such a manner that his answer will relieve the jury

from considering and determining the facts submitted.' In the present case we do not find any evidence fixing the amount of damages, except that of the two witnesses referred to, who gave it as a lump sum of \$4000.00. Neither witness gave the basis or items upon which his estimate was formed, and the sum named is the same as set forth in statement of claim. Judgment reversed."

In *American Coal Briquetting Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 170 N. W. 570. (Supreme Court of North Dakota, Nov. 30, 1918. On petition for rehearing, Jan. 8, 1919.) (Destruction of buildings by fire.)

PER CURIAM. Plaintiff has petitioned for a rehearing. Much of the petition is devoted to criticisms of certain expressions contained in the majority opinion. Leaving philological questions on one side, the basic reasoning announced in all of the former opinions is the same, viz: That there was no legally sufficient evidence as to value to sustain verdict for the amount returned by the jury in this case. And we are still of the opinion that this holding was correct.

Plaintiff called only one witness, one Wright, to testify to the value of the building. On direct examination he testified, in response to leading questions, as to the value of the property. On his cross-examination it was developed that his former testimony was in fact not as to the value, but as to the original cost of construction. No reasonable man can read Wright's testimony and arrive at any other conclusion.

(2, 3.) Plaintiff contends that, inasmuch as there was no objection to Wright's testimony when it was offered, it became competent evidence, and must be so considered. The rule

sought to be invoked is well established, but it does not go to the extent contended by plaintiff. While the failure to object may constitute waiver of the incompetency of the evidence, 'it is not a waiver of the right to question its legal effect or its legal sufficiency'. 9 Ency. of Evidence, 113. In the case at bar the legal insufficiency of the evidence did not become apparent until the witness was cross-examined. The plaintiff had the burden of proof. It was required to sustain this burden of proof. It was required to sustain this burden of substantial evidence legally sufficient to warrant reasonable men in arriving at certain conclusions. *State Bank v. Bismark E. & I. Co.*, 31 N. D. 102; 153 N. W. 459. In the case at bar the evidence adduced by the plaintiff, in our opinion, showed the cost of construction of buildings, and not their value at the time of destruction or anywhere near that time. There was undisputed evidence showing the deteriorated condition of the buildings at the time of their destruction. The evidence offered by the defendant was to the effect that the buildings at the time of their destruction were of far less value than that fixed by the jury in their verdict. Hence we were and are of the opinion that the verdict as returned has no substantial support in the evidence, and that the jury erred in its decision of the facts. *Kinney v. Brotherhood Am. Yeomen*, 15 N. D. 21; 106 N. W. 44. The defendant specifically assailed this decision by a motion for a new trial. In such motion he specified particularly that there was no competent evidence showing the value of the property destroyed to be more than \$750.00 in all. The court denied a new trial. But, inasmuch as there was no substantial and legally sufficient evidence in support of the verdict as returned, the trial court should have set aside

the verdict and ordered a new trial. 29 Cyc. 832-835.

Rehearing denied."

In *Watson et al. v. Longham*, 38 S. E. 82, Longham sued Watson & Powers for damages for the loss of certain jewelry which she alleged was stolen from her while a guest of the hotel kept by the defendants. There was a verdict for plaintiff. Motion for new trial having been overruled, the defendants excepted and appealed. The court say:

"While in our opinion the evidence demanded a finding that the defendants were liable, we do not think there was sufficient proof of the market value of the property lost to authorize the verdict rendered by the jury. The measure of plaintiff's recovery was the market value of the property at the time it was lost, to which interest could have been added and included in the total sum of damages allowed. In *Oliquot v. Champagne*, 3 Wall. 114, 18 L. Ed. 116, the trial judge charged the jury as follows: 'The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive and purchasers are made to pay when the goods are bought and sold in the regular course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard'. This charge was approved by the Supreme Court of the United States. The plaintiff in her petition set out a list of the goods alleged to have been lost, with the value of each. The verdict was the exact valuation of the jewels alleged in the petition. The only evidence as to the value of some of them was the price at which they had been purchased,

and some of the most valuable of them had been purchased many years prior to the loss. While the cost of property may be considered, in connection with other facts, in determining its value, evidence of the cost without which is not sufficient proof of its market value. In arriving at the amount of their verdict the jury was clearly controlled by the price paid for some of these jewels, and not by their market value at the time when the loss occurred, and although the evidence on the plaintiff showed that the value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, which was \$1600.00, the jury evidently estimated their value at the purchase price. As the evidence failed to definitely show the market value of the property at the time the loss occurred, a new trial must be granted."

In *Schwartz v. Schendel*, 53 N. Y. Supplement 829, only testimony touching the nature and extent of the damage was given by husband of plaintiff:

"Q. Did the water coming from the defendant's premises do any damage to any of the goods belonging to the plaintiff in the cabin?

A. Yes, sir; quite considerable.

Q. What was the value of the goods damaged?

A. I have given the value of the goods, at a rough estimate, \$200.00, but they were worth, that is, the market price of the goods was more than that, and it costs us more than that.

Q. Was that the price it would cost to replace the goods on the day in question?

A. Yes, sir.

As the nature and quantity of the goods, the extent of the injury thereto, if any, and the kind of business the plaintiff was engaged in, and the husband's connection therewith, if any,

were not shown, the former was entitled, at most, to recover nominal damages only for the alleged overflow."

In *Wagner v. Conway et al.*, 78 N. Y. Supp. 420. Potatoes destroyed. Evidence of value and amount of seed potatoes, and evidence that defendant Conway said that the potatoes were worth \$150.00.

"While the significance of this phrase is not obvious, its use certainly shows that the witness did not intend to testify as to the market value generally or in the locality where the trespass was committed. In view of the paucity of proof on the question of value, we think that counsel for the defendant was right in insisting that there was not sufficient evidence on the subject upon which to base a finding; and it is difficult to resist the conclusion that in assessing the damage at \$200.00 the jury indulged in mere speculation and guesswork. It is to be observed that there was no testimony whatever as to the number of bushels of potatoes which the land would have produced if left undisturbed.

On account of the insufficiency of the proof on the question of damages, a new trial ought to be granted."

In *Glass v. Hauser*, 78 N. Y. Supp. 830, the court say:

"But the trial Justice, upon seemingly insufficient evidence therefor, rendered judgment in favor of plaintiff for \$263.05. The plaintiff testified in one breath to \$380.24 and in the next to \$363.05 as to the value of the goods and later to \$328.24 as their cost.

Q. Was the value at the time you bought the same as they are now?

A. Before they were a little more valuable.

Q. Did they grow any less in value from the time that you delivered them to the defendant until now?

A. Now they are worth less money.

Q. At the time you did ask them for it they were worth the same?

A. Yes.

This, with the other statements by the plaintiff, may not be said to furnish a basis for the amount of the judgment as rendered. For this reason the judgment should be reversed."

In *Brooke v. Cunard S. S. Co., Lim.*, 93 N. Y. S. 369, plaintiff recovered judgment of \$200.00 for loss of baggage. Appeal raised question of sufficiency of evidence of value of articles lost.

"There was no proof of the value of any of the goods lost. The plaintiff, who was the only witness in his own behalf, testified that he based his opinion of their value upon the prices paid for them, and gave specific testimony of the cost of but three articles (a winter suit, a fur-lined winter coat and a fur hat) out of some thirty different items. It is plain that such proof will not support a judgment. It is true that the price paid for articles when new furnish some evidence of their value at the time of their loss, when their age and condition are described (citing *Hanover v. Bill*, 141 N. Y. 140; 36 N. E. 6), but, with the exception mentioned, there was no evidence in this case as to the age or condition of the lost articles, nor as to their cost price. Judgment reversed for reason mentioned."

In *Walsh v. New York City Ry. Co.*, 93 N. Y. Supp.:

"The item of damage is supported only by evidence of the cost of the articles and their

condition after the accident and without any proof of their reasonable value or the wear to which they have been subjected, their condition before the accident, or of any of the details which would have enabled the jury to determine how much they had depreciated. This failure of proof defeats the judgment."

In *Lee et al. v. Callahan*, 84 N. Y. Supp. 167, action for damage for loss of horse:

"They recovered judgment for their loss in which an important item was the value of the horse, as to which no evidence was given except the statement by one of the plaintiffs, who does not appear to have ever bought an animal, and of the other that he had paid \$65.00 for it a year and a half before and that he did not know what was its market value.

Much of the evidence might or should have been excluded upon proper objection. The defendant's motion, however, at the close of the case to dismiss the complaint for failure to show facts constituting a cause of action, is sufficient to require reversal of the judgment founded upon an arbitrary judicial estimation of the value of the horse. Judgment reversed. All concur."

In *Whitmark v. Lorton*, 8 N. Y. Supp. 480, the court say:

"The trial judge erred, however, in awarding more than nominal damages to the plaintiff. There is no proof of the value of the sewing machine for the conversion of which the action was brought; and in the absence of proof of value nominal damages only are recovered. *Connors v. Meir*, 2 E. D. Smith 312. It is true that plaintiff testified that she paid \$49.00 to one Tuckeman on account of the purchase price of the machine, but proof of what plaintiff has paid or agreed to pay for the thing alleged to

have been wrongfully converted is not proof of its value. Judgment should be reversed."

In *St. Louis Southwestern Ry. Co. v. Miss.*, 84 S. E. 281, action for damage to household goods caused by fire due to defendant's negligence:

"While the cost of property is admissible as a circumstance tending to show value at the time of destruction, we do not think it is sufficient, standing alone, to furnish the jury a basis for a verdict."

In *St. Louis I. M. & S. Ry. Co. v. Law*, 57 S. W. 259, plaintiff recovered judgment for destruction of cattle at Portland. The only evidence of damage as to this item was that plaintiff testified he considered the cattle (112) were damaged \$3.00 per head, and further said: "I considered they were damaged that much", and testified that 206 head were damaged \$1.50 per head. The court say:

"This was all the evidence adduced to show the damage mentioned, and it is clearly incompetent, for it is not as a general rule permissible for a witness to estimate the damages or property loss sustained by the doing or omission to do a particular act. The damage in quantum was the precursory injury the plaintiff suffered on account of the unreasonable delay at Portland. We do not know what elements entered into his estimate of the same.

* * * This is one of these cases in which there is no room to estimate damages except in one way. Hence the greater reason for confining witnesses to a statement of facts and allowing the jury to estimate the damages under proper instruction of the court. The jury should have been left to determine the dam-

ages according to the facts, uninfluenced by the opinion of the interested witnesses.”

Carmen v. Montana Cent. Ry. Co. (Mont.), 79 Pac. 690, was an action for damages resulting from the wrongful killing and injuring of cattle. One of the questions before the court was whether the evidence upon the question of damages was sufficient to justify the verdict. In course of the opinion it is said:

“But again, there is no competent testimony in the record as to the amount of damages sustained by plaintiff. Three animals were killed and three injured, one of which afterward died. Plaintiff was the only witness upon the question of damages, and he failed to testify directly or clearly as to the amount of his damages. He was not asked as to the amount of his damages, but simply as to the value of the animals killed and injured. He does not give the damages he sustained to the cattle which were injured and not killed, and his testimony as to the value of the cattle killed is also very indefinite, as shown by the following questions and answers:

‘Q. What would you place the value of these animals—taking all those that were injured and killed, what would you place the damage at—the value?

A. I wouldn’t have sold them for near the amount of money I put them in for.

Q. Well, \$240.00?

A. I wouldn’t take that for them no day in the week.

Q. Well, tell the jury what they were worth, so we can get the testimony.

A. They were worth to me probably more than they would be to most anyone else, because I had only a small herd, and I was trying to

grade them up to get as good a herd as I could, but I put them in for \$250.00.

Q. Were they worth that to anybody?

A. Yes; that's my opinion.'

Plaintiff's damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages for the cattle injured could not be fixed by the same rule. We do not think this testimony was sufficient to go to the jury at all. The burden was upon plaintiff to show with reasonable certainty what loss he had sustained, and to show that amount as definitely as possible. *Mining Co. v. Freckleton (Utah)*, 74 Pac. 652. It left the matter of the amount of damages sustained by plaintiff entirely to conjecture by the jury, and no verdict for the amount rendered could be sustained which had been arrived at upon this testimony. The amount of damages which plaintiff is entitled to recover should not be left to conjecture."

In *McGillvray v. Hampton*, 179 Pacific 733 (District Court of Appeal, Second District, Division 1, California, Feb. 13, 1919), the court say:

(4, 5.) "As to the finding of the court that the hay destroyed had a market value of \$8 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value at a greater sum than \$8 for baled hay, one witness stating that it was worth '\$8 or \$9'. The cost of baling was proved to be \$1.75 per ton. The price of \$8 per ton as fixed by the trial judge for unbaled loose hay is not supported by a word of testimony. We were much puzzled to understand how the court could have arrived at the figure stated in its findings as to the ton price of hay until we read in the transcript a statement of the remarks of the judge in summing up his conclusions;

and after we had read that statement we were more surprised than puzzled. We quote the dialogue between the court and the counsel:

‘Mr. CLAYSON. You are establishing the value of \$8 for unbaled hay?’

The COURT. I think so. Of course, when a witness testifies as a matter of opinion he is giving himself more leeway than when he testifies to a fact. He is simply giving his opinion, and when he testifies there is a little bias in favor of the side that calls the witness, and that is invariably noted by the courts in hearing the testimony of such witnesses. Of course, this is not a part of the record, but hay has been very high in this country for two or three years, hasn’t it? Any hay would command a pretty good price. Is that true? I think \$8 is probably—the lady puts the value at how much?

Mrs. MCGILLVRAY. I was offered \$8.

The COURT. \$8.00 will do for the time being until I am reversed by a high court.’

The statement of Mrs. McGillvray, volunteered in answer to the court’s question, referred to no particular time, but her testimony given earlier in the trial showed that the only offer of a higher price than \$8 for baled hay received by plaintiff was after the fire occurred—how long does not appear. We regret exceedingly in this case to be compelled to verify the prophecy of the trial judge by ordering a reversal of the judgment, especially for the reason that the amount involved is small and much delay has been occasioned by the protracted course of this litigation over a few tons of hay. If we were authorized to modify the judgment, we would adopt that course; but the error complained of goes to a finding of a fact which we have not the power to revise.

The judgment appealed from is reversed.

We concur: Conrey, P. J.; Shaw, J.”

In *Johnson v. Levy* (Cal.), 86 Pac. 810. This was an appeal from a judgment awarding the plaintiff \$300.00 as damages for the wrongful taking and detention of the possession of a livery stable. It was held that the evidence was not sufficient to support the finding upon which the judgment was based. In passing upon this question the court say:

“The findings relating to rental value and damages are not supported by the evidence. While there is some vague and unsatisfactory evidence tending to show that the value of the rents, issues and profits was \$60.00 per month, there is no evidence whatever tending in the remotest degree to show that the rental value amounted to that or any other sum. The evidence touching damages lacks every element of certainty. It consists solely of the guess or reasons for the guess. Both the direct and cross-examinations of the plaintiff, and even this is not supported by data or particulars, demonstrates that he had no personal knowledge upon which to base an estimate, and the information derived from others was of the most general and indefinite character. It is well settled that such evidence will not support a finding as to damages.”

In *Hatch Bros. Co. v. Black et al.* (No. 884), 165 Pacific Reporter, page 520, the court say:

(6, 7.) 3. “It is contended that there was no competent evidence of the amount of damages, if any, suffered by defendants. The evidence consists of testimony that the crops for the years 1912, 1913, and 1915 were damaged. We fail to find any evidence of the value of the crops for 1912. For 1913 the defendant Joseph Black testified that he estimated the crop for that year at 700 bushels of grain, while on

practically the same ground in 1914 they had 1800 bushels; but there was no evidence of the value of the grain other than his statement that the damage to the crop was \$500. For 1915 he testified that the damage to the grain was \$700; that they had a good prospect for a crop. How a jury could arrive at the correct measure of damages from the evidence we are unable to see. The measure of damages for injury to, or destruction of, crops is the value of the crops in the condition they were in at the time and place of the injury or destruction. *Lester v. Highland Boy Gold Mining Co.*, 27 Utah 470; 76 Pac. 341; 101 Am. St. Rep. 988; 1 Ann. Cas. 761; *Teller v. Bay and River Dredging Co.*, 151 Cal. 209; 90 Pac. 942; 12 L. R. A. (N. S.) 267; 12 Ann. Cas. 779, and note. The amount of such damages is for the jury to determine from the facts proven, and not from the opinion of the parties or witnesses. 'The reason for this rule is that it is the province of the jury to estimate the damages upon the facts as shown by the evidence, and the only end accomplished by the admission of such opinions and conclusions is the substitution of witnesses for jurors and of theories for facts. 4 Enc. of Evidence, 12 et seq., and cases there cited.'

In *Warshawsky et al. v. Dry Dock E. B. & B. Co.*, 86 N. Y. Supp. 748, the court said:

"The son of one of the plaintiffs, who was called to testify as to the repairs done to the wagon, was not qualified as to the reasonable value of the necessary repairs, and his testimony as to the cost alone was insufficient."

In *Vokmar v. Third Ave. R. R. Co.*, 58 N. Y. Supp. 1021, the court said:

“The plaintiff testified specifically as to what parts of the coach suffered in the collision, and how much he paid for each item of repair. But, beyond the mere fact of the amount paid, there was no evidence of the value of the repair, or that the sums actually expended were either reasonable or necessary.”

Hays v. Windsor, 62 Pac. (Cal.) 395, was an action of replevin. Judgment was for the defendants and the court awarded them damages for the wrongful taking and detention of the property under the writ of replevin. One of the questions presented was whether the evidence was sufficient to support the finding of the court upon the question of damages. The portion of the opinion relating to this matter reads as follows:

“The court awarded \$175.00 to defendant Ewell Windsor, and to defendant Alice Windsor \$125.00 as damages, and gave judgment accordingly. Ewell Windsor claimed in his answer \$250 for counsel fees, which he testified he had agreed to pay his attorney for services in this case, and he also claimed \$100 for ‘trouble and expense’ and for ‘time consumed in the pursuit’ of the property. Alice Windsor employed the same attorney and claimed for his services the sum of \$100 and also \$100 ‘as special damages for the wrongful taking and detention of the property’. In support of his claim for these items, Ewell Windsor testified to an agreement to pay the above amount to his attorney, and as to the other item he testified: ‘I have lost a good deal of time, have been deprived of the possession of the crop, and have been delayed in the payment of my debts, and I think I have been damaged in that regard at least \$100.’ Mrs. Windsor testified to the employment of the attorney, and her liability to

pay him \$100.00, and claimed 'further damages by delay and trouble in the further sum of \$100'. This was all the evidence on these questions.

Appellant contends that there is no evidence to support the judgment for any special damages except as to attorney's fees, and that there is no authority of law for the latter item. Aside from the question as to attorney's fees, the evidence fails to show with any certainty any damage for the pursuit of the property; at most it gives the opinion of defendants that they were damaged, but states no particulars on which the opinion is based."

This court, in the case of Boland v. Balaine, 266 Federal, page 22, in which it was urged that the evidence as to the amount of damages which was given in the way of estimates of value was speculative and visionary, and did not constitute the proper basis upon which to predicate the measure of damages, concurred in said contention.

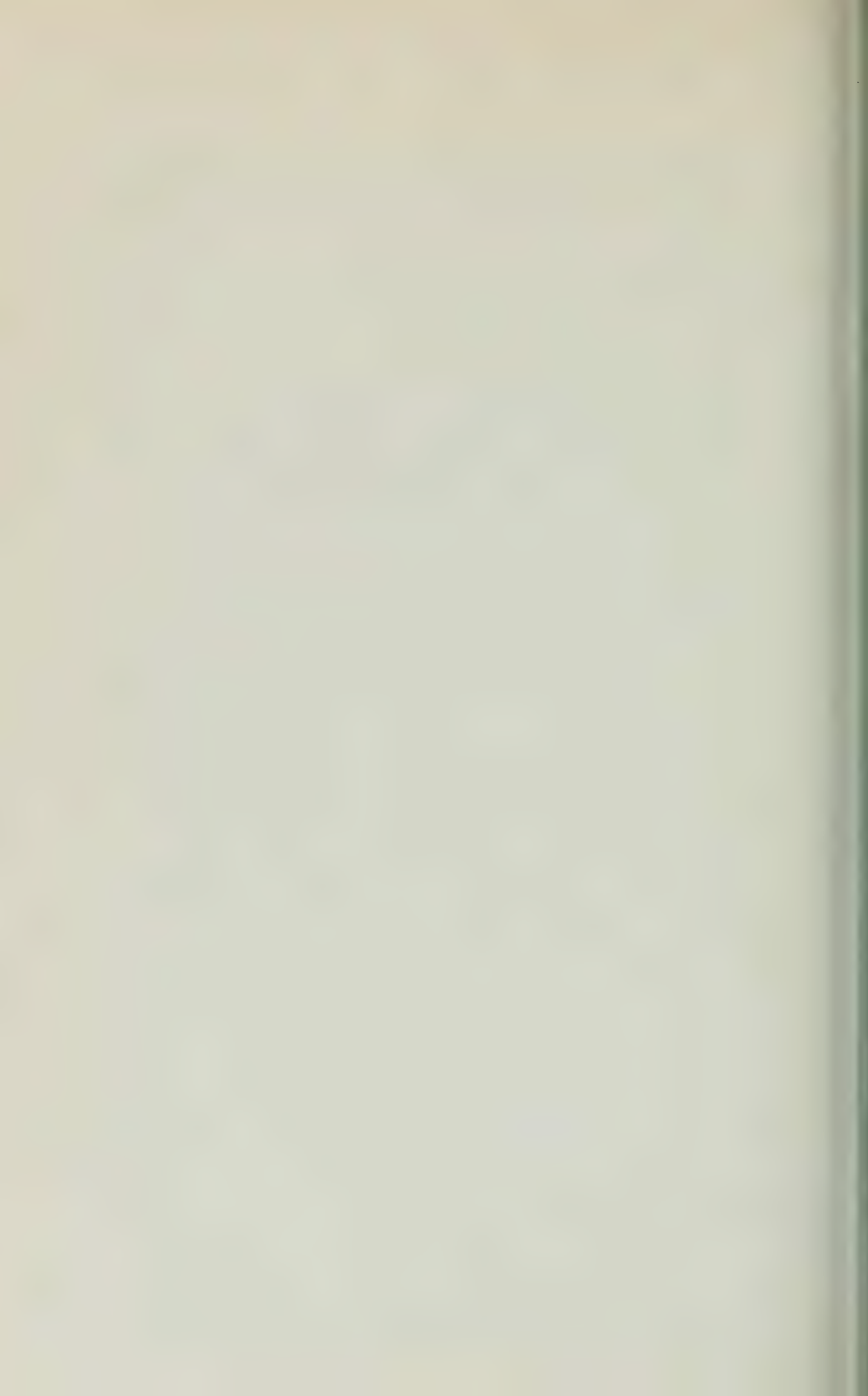
We respectfully submit that the evidence considered according to the rules laid down in these cases is insufficient to justify a verdict in any amount; that it is for the jury to determine the amount from the facts furnished them, and that the plaintiff's opinion as to the amount of damages is an infringement on the province of the jury and not sufficient to justify the verdict, and that the cause should be reversed.

Dated, February 20, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff in Error.



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA JUNEAU GOLD MINING
COMPANY, a Corporation,

Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

HENRY RODEN,

Attorney for Defendant in Error.

FILED

1913

U. S. DISTRICT COURT



No. 3813.

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ARGUMENT.

Plaintiff in error in its brief, page 10, admits that sufficient testimony was introduced upon the trial to justify the lower court in submitting to the jury the question as to whether or not water escaped from the penstock prior to the happening of the slide. A large volume of testimony was submitted upon this point, not only by plaintiff below, but also by defendant below. Its witness Higgins (p. 885 *et seq.*) testifies that he saw a stream of water coming from the spout shortly before the slide and that he hurried to a nearby telephone to inform the man in charge to investigate. Its witness Wert Newman (p. 831) testifies

that shortly before the slide he saw a stream of water ("of the same size as my leg") escape from the trommel spout. In addition to this there was the testimony of many witnesses who testified to seeing water escape from the trommel early in the morning. The witness Hyle saw a stream of water escape from the penstock an hour or so before the slide. (Tr., p. 127.) The witness Maynard saw a stream of water escape from the flume at half past nine in the morning of the day of the slide. (Tr., p. 132.) The witness Benson saw a stream of water escape from the end of the flume. (Tr., p. 322.)

See evidence Bussey (Rec. p. 158); also Newman (p. 170); also Johnson (p. 182).

It will hardly be claimed that there was no substantial testimony upon the point under consideration. The particulars of negligence complained of are as follows: "by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time for any reason might be conveyed to the penstock in excess of what the distribution pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises in question." Plaintiff below further claimed "that ordinary and reasonable care and caution on the part of defendant required that it should have constructed and maintained at all times such waste flume to carry away such water or surplus water and that defendant was negligent in not providing such protection against injury from surplus or overflowing water at or near the penstock."

We have heretofore shown the existence of ample evidence to sustain a finding that water overflowed and escaped from the penstock through and over the trommel screen spout. There was ample evidence to the effect that ordinary precautions on the part of defendant below should have caused it to install a flume or conduit to carry off any water that could not be taken care of by the service pipes.

See evidence of Dudley (Rec. pp. 80 and 84; Robe (p. 428).

The witness H. P. Crowther testified:

"Q. State whether or not ordinary careful engineering of handling this water would require the installation of such a box? (To carry to a safe place any overflow water from the penstock.)

"A. In my opinion it would." (See Rec., p. 143.)

The question as to negligence was fully and fairly submitted to the jury by the trial court. The jury was instructed that it was incumbent upon plaintiff below to sustain at least one of its enumerated acts of negligence on the part of defendant below. Upon this point the court submitted special questions to the jury, which questions and answers thereto were as follows:

"Q. Was the defendant negligent in any of the particulars set forth in the complaint?

"A. Yes.

"Q. If so, in what did that negligence consist?

"A. Failure to provide waste flume to carry overflow water from penstock and trommel screen to place of safety." (Pr. Tr., p. 1014.)

It is clear then, that there was ample evidence to support the contention that water came from the penstock and found its way down the hillside and that ordinary careful mining would have required the installation of a flume to take care of any water escaping from the penstock. Plaintiff in error says the water did not escape from the penstock but from the trommel screen. But it also states in its brief (p. 16) that this revolving screen was "in the penstock."

Plaintiff in error further claims that "if any water from its works reached the slide area, this was not due to its negligence, but to independent intervening causes." In other words, the slide was not caused by the negligent act of defendant below, but by the clogging up of the screen caused by an accumulation of rubbish carried to it by reason of a slide which occurred along the upper end of the flume line.

The question as to the proximate cause of the slide was fully and correctly submitted to the jury by the trial court.

Defendant below offered no instruction upon this point and made no objection to the instruction given.

We believe we have shown that the first contention of plaintiff in error, that there was no evidence of the negligent acts complained of and that it was conclusively shown that the slide was caused by independent intervening causes, is not sustained by the evidence.

The second ground presented by plaintiff in error for a reversal of this case is based upon the claim that there was no evidence of injury to the property de-

scribed in the complaint and no evidence of the value of the injured articles.

The first item of damage concerns the store building and is for \$1500.

Upon this item plaintiff below testified that he based his estimate upon the cost of restoring the building to its original condition. That the repairs made necessary by the negligent acts of defendant below, immediately after the damage had been inflicted, would cost the amount mentioned. This was his best judgment, based upon his experience and the result of investigation made by him of persons qualified to speak upon the subject.

At the time this evidence was introduced defendant below offered no objection of any kind. It freely entered upon cross-examination. If it desired further light upon the subject under consideration it was there to be had. Defendant below could easily have ascertained all the details which plaintiff below considered in making up his estimate of damages.

"The measure of damages to property is the cost of restoration when that can be done at reasonable expense."

Watson vs. Mississippi Power Co., 156 N. W. 188.

"The damage sought being for the injury to the house, and not to the land, the jury should have been instructed that the proper measure of damages was the amount necessary to restore the building to its condition before the injury was inflicted."

Empire Mills Co. vs. Neering et al., 89 S. E. 530.

The second item covers damage done to the stock of merchandise by water and mud. The plaintiff testified that he had been engaged in the mercantile business for a number of years. That the stock damaged was in his store and warehouse; that it was damaged by water and mud and that some of it was entirely lost. (Tr., p. 207.) The witness further testified that his estimate was based upon the price "goods were worth at that time." (Tr., p. 207.) He also testified as to what these goods consisted of, namely, "boots, groceries, shoes and clothing of the value of \$1500 in the store building and rice, bacon, hams, flour and beans in the warehouse, worth \$1000. (Tr., p. 209.)

The testimony shows that the slide came without warning. That plaintiff had barely time to escape from the invaded premises and thereafter gave his immediate attention to the rescue of several unfortunates who were buried in the debris. (Tr., p. 203 *et seq.*)

The plaintiff testified that the merchandise stored in his store and warehouse was destroyed and damaged; that he is unable to give a detailed list of every item lost and that his best judgment and estimate is all he can give under the circumstances. The honest and high regard for his oath which the plaintiff below displays in the giving of his testimony is now sought to be made the basis of his failure upon this point. The principle of law is to the effect that under circumstances such as are disclosed by the evidence in this cause, the tortfeasor will be held liable for such

damages as his negligence has occasioned, and if the injured party cannot minutely detail every item of loss sustained by him, the court will in every instance permit him to give his best estimate and judgment upon the amount.

"The owner of a stock of goods may testify to their value in a single sum after evidence that he is the active manager of the business conducted with the stock; that he knows the value; that the goods were destroyed, and that he cannot give the items of the stock in detail."

Union Pac. R. Co. vs. Lucas, 136 Fed. 374.

"The trial court did not err in permitting plaintiff to state as best he could the amount and quality of the lumber in the cars that were burnt."

Coleman vs. Retail Lumbermen's Assoc., 79 N. W. 588.

"Defendant objects that there was no competent proof of the value of the goods destroyed and therefore the verdict not sustained by evidence. This objection, it seems to us, goes to the weight of the testimony rather than to its competency. Plaintiff testified to the value of the goods. He had purchased the same, they were in his personal charge, he had been selling from the stock and was undoubtedly competent to speak of the value of any particular article. In proving the value of personal property it is usually held that the owner is allowed to estimate its value whether he is qualified as an expert or not. 1 Wigmore, p. 716. Witness testified that he was familiar with the value the different kinds of goods; that it was part of his business to estimate and value stock on hand and that the leather and rubber goods on hand was not less than three thousand dollars and the whole stock not less than eight thousand dollars. We are of opinion that where no more accurate evidence is obtainable under

the circumstances, the owner of such stock may give his opinion as to such value, to otherwise hold would result in a denial of justice in many cases. The law does not require mathematical certainty, but merely the best obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of the witness and the discretion of the jury."

Jensen vs. Palatine Ins. Co., 116 N. W. 286.

Unless some other basis is shown to exist upon which a witness bases his estimate as to values, it will be presumed that the estimate is based upon the market value at the time such estimate is made.

"The witness testified that the killed and injured horses were of such and such a value. We think this fairly implies the market value at the time. The witness fixed no other basis of knowledge and when one speaks generally of the value of chattels it means their value in the market. This is inferred unless a different basis of value is fixed by the witness."

Coyle vs. Brown, 41 Pac. 389.

In the case at bar the plaintiff below testified that the goods and merchandise destroyed and lost was fixed at the "price goods were worth at that time." (Tr., p. 207.)

Surely this estimate was based upon the market price of the articles at the place and time where and when they were destroyed.

The third item covers the damage done to plaintiff's warehouse. He testifies that this warehouse was totally destroyed and that the cost of replacement is \$1400.

In *Kennedy vs. Treleaven*, 175 Pac. 977, the court say:

"There is no universal test for determining the value of property destroyed or injured and the mode and amount of proof must be adapted to the facts of each case. (Quoting Sutherland on Damages, 3d ed., 1015.) *The cost of replacing the building, making perhaps reduction for depreciation, is a better measure of what the property was fairly and reasonably worth at the time it was destroyed. One method of arriving at such loss is by estimating the cost of replacing the building, and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins.*"

"The value of the property destroyed or the cost of restoring or replacing it is the proper measure of damages for the destruction of buildings which may at once be replaced." 8 R. C. L. 485.

The fourth item of damage concerns the destruction of the apartment house. The testimony shows that the building was totally destroyed by the slide. That it had cost the defendant in error eight thousand dollars and that eight thousand five hundred was the cost of its reconstruction. The building was comparatively new and had been used for rental purposes.

The fifth and last item concerns the value of the fixtures and furniture in the apartment house. The plaintiff gave an itemized list of the articles, together with their value, and testified that the articles were worth the respective amounts at the time of their destruction. (Tr., pp. 209-214.)

These cover the various items of damage to the allowance of which plaintiff in error objects.

We have already submitted a number of authorities to show that the trial court was correct in its ruling upon the motion for a new trial when the same points were raised. Upon this motion the lower court directed a reduction of the verdict in the sum of \$4500 because plaintiff had failed to submit satisfactory evidence upon two items set up in the complaint totalling this amount. Upon the remaining items the trial court found that sufficient evidence had been submitted to sustain the findings of the jury.

An examination of the authorities will disclose the correctness of the ruling of the trial court.

“Ordinarily the measure of damages for destroying buildings is what it costs to replace them.”

Silva vs. City Council, 148 Pac. 150.

“The measure of damages to property is the cost of restoration when that can be done at reasonable expense and not the diminution in value of the property.”

Watson vs. Mississippi Power Co., 156 N. W. 188.

In

Chicago & E. R. Co. vs. Ohio City Lumber Co., 214 Fed. 751,

a case very much like the case at bar, the witness had been asked “what, in your opinion, is the fair and reasonable value of each of the buildings destroyed just prior to the fire (by which they were destroyed)?”

The witness also placed lump sum values upon the lumber, glass, hardware and tools destroyed.

Objection was made because, 1st: the witness was not qualified to testify as to the value; 2d: because values were stated in gross sums and not in detail; 3d: because the true measure of the value of the buildings was their "fair market value" and not "their fair and reasonable value."

Said the United States Circuit Court of Appeals (8th Cir.) upon the objections raised:

"These contentions are without merit. The witness lived in the dwelling house and used the other buildings which were burned and knew their age, location, use and condition. He was acquainted with the value of building material. With such knowledge and experience he was well qualified to testify on the subject of values. * * * Where more accurate knowledge is not available or obtainable any person, whether owner, active manager or employe who is familiar with the property or goods connected with and used in a business, although not an expert, may testify as to the value of such property when destroyed, or his estimates of value may be given in single or gross amounts."

In the case at bar the plaintiff below was well acquainted with the property destroyed. He was the owner thereof, had built the same and had managed them for a number of years. He testified as to their fair and reasonable value at the time of their destruction. He knew what their construction had cost and he further testified that he had consulted a number of builders and had obtained from them such information concerning cost of construction and material as would enable him to give an estimate as to what the cost of replacement would be. All this testimony was

submitted to enable the jury to determine as to the fair value of the property at the time of their destruction.

In *Walker vs. Collins*, 50 Federal, witnesses testified that they knew the character of the goods taken and had been selling the same and that they thought they knew the "fair value." Held not error.

In the case at bar the witness testified that he had been conducting a mercantile business upon the premises, and he gives the market value of the merchandise lost at the time of the accident. Being a merchant, as the testimony discloses, it is fair to conclude that he was acquainted with all the items that go to make up such value.

"No hard and fast rule can be laid down as to the measure of loss suffered by the destruction of buildings. In some instances it may be their value detached from the land and separated from the use made of them; in others, *where an active market is shown* to exist, the market value may be the fair measure of loss. In still others, the cost of reconstruction, after deducting depreciation from age and other causes, may fairly recompense the owner. *Usually, however, the real or ordinary value, based upon and determined from its cost, age, condition, location and the use to which it has been put, furnishes a fair measure of the loss occasioned by its destruction.* In this case, it appears the buildings were located in a small village and had little, if any, market value. No error was committed in permitting the witness to testify as to the fair and reasonable value of these buildings, taking into consideration their age, condition, depreciation, and cost of reconstruction and their use."

Chicago & E. R. Co. vs. Ohio City L. Co., 214 Fed. 751.

In the case at bar the plaintiff below testified as to the location of the buildings, the use made of them, their age, their cost of construction and the estimated cost of reconstruction. They were located in a community where "no active market in real estate was shown to exist," and the jury, in returning a verdict for over three thousand dollars less than plaintiff claimed to have been his loss on account of defendant's negligence, must have made some allowance for depreciation, in spite of the fact that the testimony shows the \$8000 apartment house to have been a new building. But if these values were swollen or false, the plaintiff in error did not attempt to show it. It was apparently well pleased with the estimates submitted by defendant in error.

Says the Supreme Court of Missouri in *Seyfarth vs. Railway Co.*, 52 Mo. 450, involving the testimony of husband and wife as to the value of goods of a kindred character as in the case at bar:

"the subject of inquiry was not one to which the doctrine in reference to experts applied; and it cannot be questioned that the opinion of this witness as to the value of the articles was clearly admissible under the circumstances. The plaintiff was not obliged to restrict the examination to the value of each article, and in that way arrive at the total value; nor was it incumbent on him to show the process by which the conclusion of the witness was reached."

"We think it was competent for the witness (the owner of the goods) to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant

desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods."

Western Home Insurance Co. vs. Richardson,
58 N. W. 600.

To the same effect are the following:

Erickson vs. Draskowski, 54 N. W. 283,
(Mich.);
Tubbs vs. Garrison, 25 N. W. 923 (Iowa);
Railway Co. vs. Miller, 162 S. W. 76;
P. & N. T. Ry. Co. vs. Porter, 156 S. W. 267;
Fairfax vs. Railway, 73 N. Y. 167, 29 Am.
Rep. 119.

"The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony may be left to the jury; and courts have usually made no objections to this policy."

Wigmore, vol. 1, par. 716.

In the case of *Pecos & N. T. Ry. Co.*, 171 S. W. 318, one of the owners of a part of the property testified as to the worth and value of a part of the personal property consisting of clothing, culinary articles, household paraphernalia, etc., stating the same item by item. Defendant objected to the witness, "stating what said items were worth, because this was not the proper method of proving the value of said articles, or the proper measure of damages for the loss thereof."

Says the court, after quoting numerous authorities:

"We are unable to find any well considered case, as to the peculiar property involved here,

that the owner of the goods, as a witness, is required to state the elements mentioned (cost of articles, period of their use and their condition at time of destruction) as a precedent qualification to testify to their value. The defendant produced no witness testifying to the value of the property lost; neither does the record show any cross-examination by defendants of the witnesses attempting to ascertain the cost of said articles, the extent of their use, the kind and character of the same, or as to the condition of the goods at any time, but rely solely upon the general objection. If the value in this instance is at all fanciful, or if the ingredients of cost, the extent of the use of the property, the condition of same at the time of their loss would have indicated to the jury that the value placed upon the same was improper, we believe, in this character of case, it is the duty of defendant to elicit it."

An examination of the authorities submitted by plaintiff in error do not sustain its contention.

In *Illinois Central R. Co. vs. Elliot*, 82 S. 585, complaint is made about the charge of the court upon the measure of damages. In the case at bar the instruction given was apparently satisfactory to plaintiff in error for no objection was offered and no proposed instruction tendered upon this point.

Counsel quote from *Byrne vs. Combria Co. Ry. Co.*, 68 Atl. 672. They forget to quote that the evidence complained of was given over the objections of the defendant. An examination of the record in the case at bar fails to disclose the interposition of a single objection against the admission of the evidence now complained of.

Counsel quote at length from the decision in

Watson et al. vs. Loughram, 38 S. E. 82.

An examination of this case discloses that counsel fail to quote the important part of the decision. The case was reversed upon an erroneous instruction concerning the measure of damages. We quote from the decision:

"The only evidence as to the value of some of the jewels was the price at which they had been purchased and some of the most valuable of them had been purchased many years prior to the loss. In arriving at their verdict the jury was clearly controlled by the price paid and not by their market value at the time when the loss occurred, and although the evidence of the plaintiff showed that the market value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, the jury evidently estimated them at their purchase price. (Verdict being for the exact amount set up in the petition.) In view of this, it was error to charge the jury as follows:

" 'This is a question of the value of property, and you are to be governed by the value of that property as produced upon the stand; whether right or wrong is no concern of yours—you find your verdict according to what is proven to be the value of the property.' "

Upon this instruction the Appellate Court remarks:

"As we have seen with reference to some of the jewels lost the only value produced upon the stand was the valuation put upon them by the buyer and seller at the time of their purchase, and the jury, from the charge that they were 'to be governed by the value of that property as produced upon the stand' which, 'whether right

or wrong, was no concern of theirs' might have understood that they were compelled to find the value of these jewels in accordance with that valuation."

A very different situation from the case at bar, where the Court instructed correctly upon the measure of damages and to the satisfaction of plaintiff in error.

In *Schwartz vs. Schendel*, 53 N. Y. S. 829, the only evidence introduced was to the effect that some damage had been done to certain goods by water overflowing and that the value of the goods damaged, at a rough estimate, was \$200. There was no testimony as to the nature and quantity of the goods nor as to the extent of the injuries thereto.

In *Glass vs. Hauser*, 78 N. Y. S. 830, the court says:

"In one breath plaintiff testified to \$380.24, in the next to \$365.05, and in the next to \$363.05 as to the value of the property, upon which the justice gave a judgment in the sum of \$263.05."

In *Lee vs. Callahan*, 84 N. Y. S. 167, the plaintiff stated what he paid for the injured horse a year and a half before the accident, and that he did not know its market value.

In *Whitmark vs. Lorton*, 8 N. Y. S. 167, plaintiff testified what he had paid or agreed to pay for the property converted, and the court held that this testimony furnished no basis for the amount of damage he might be entitled to.

In *Brooks vs. Cunard S. S. Co.*, 93 N. Y. S. 369, an action brought for the loss of baggage, the testimony of plaintiff was that he based his opinion of the

value of the goods lost on their cost price, unaccompanied by further testimony as to their cost price, except in the case of a very few articles.

Counsel quote from

Carmen vs. Montana Cent. Ry. Co., 79 Pac. 690.

From the quotation of plaintiff in error one might conclude that the case was reversed on account of lack of evidence to support the finding as to the amount of damages. Such is not the case. The Appellate Court found no evidence to sustain the allegations of the complaint as to the negligent conduct of the defendant railway company, on account of which the cattle were claimed to have been killed and injured. As to the testimony to support the amount of damage done, it clearly appears that the value of the killed animals and the value of the injured ones were lumped in the sum of \$240. The evidence is:

"Q. What would you place the value of those animals—taking all those that were *injured or killed*, what would you place the damage at—the value?

"A. I would not have sold them for near the amount of money I put them in for.

"Q. Tell the jury what they were worth (the killed and injured animals).

"A. They were worth to me more than they would be to most anyone—I put them in for \$250."

We find no fault with the court when it says:

"The damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages, for the cattle injured, could not be fixed by the same rule."

Certainly the value of the injured cattle was not the amount of damages sustained by plaintiff in that case.

In *McGillivray vs. Hampton*, 179 Pac. 733, quoted by counsel for plaintiff in error, the court says:

"As to the finding of the court that the hay destroyed had a market value of \$8.00 per ton, we have searched the record in vain to find evidence to support it. None of the testimony placed the value of baled hay at a greater sum than \$8.00 for baled hay; the cost of baling was proved to be \$1.75 per ton. The price of \$8.00 per ton for unbaled hay as fixed by the trial judge is not supported by a word of evidence."

The last case cited by plaintiff in error is *Hays vs. Windsor*, 62 Pac. 395, this being an action for replevin. Upon the question of damages, and upon which plaintiff in error seems to rely, the syllabus reads:

"Evidence that defendant, in an action of replevin, had lost much time and had been deprived of the replevined goods, and had been delayed in the payment of his debts, is not sufficient to show the damage resulting from the wrongful suing out of the writ."

Counsel refer to the case of *Boland vs. Ballaine*, 266 Fed. 22, decided by this Honorable Court. This was an action for malicious prosecution. Plaintiff gave evidence of the value of lots and blocks owned by him prior to the bringing of the suit and then contrasted these values with the values after the suit. Objected to because not the proper measure of damages in an action for malicious prosecution. Say the court:

"Plaintiff is confined to the establishment of actual damages sustained, which must be shown by loss of particular sales that eventuated by reason of the clouding of his title. He is not permitted to show generally that his property depreciated in value between the time of the commencement of the suit and lapse of time for appeal."

In conclusion, we desire to call the attention of the court to the fact that the record in the case at bar fails to show that plaintiff in error at any time objected to the testimony given by defendant in error upon the amount of damages sustained by him. It entered freely upon a cross-examination and it is significant that it offered not a particle of testimony showing or tending to show that the several amounts testified to by defendant in error were merely speculative, false or fanciful.

"The defendant offered no evidence as to the value of the property destroyed. If its counsel believed that the estimate of value given by plaintiff was incorrect or too high, it would not have been difficult for them to show the true and correct value of staple articles of merchandise; having made no effort to disprove or contradict plaintiff's proofs in that regard it is fair to assume that they had small confidence in their ability so to do."

Chicago & N. E. R. Co. vs. Ohio City Lumber Co., 214 Fed. 751 (8th Circt.).

We respectfully suggest that the judgment of the lower court should be sustained.

Respectfully submitted,

HENRY RODEN,
Attorney for Defendant in Error.

No. 3813

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),

Plaintiff in Error,

VS.

ISADORE GOLDSTEIN,

Defendant in Error.

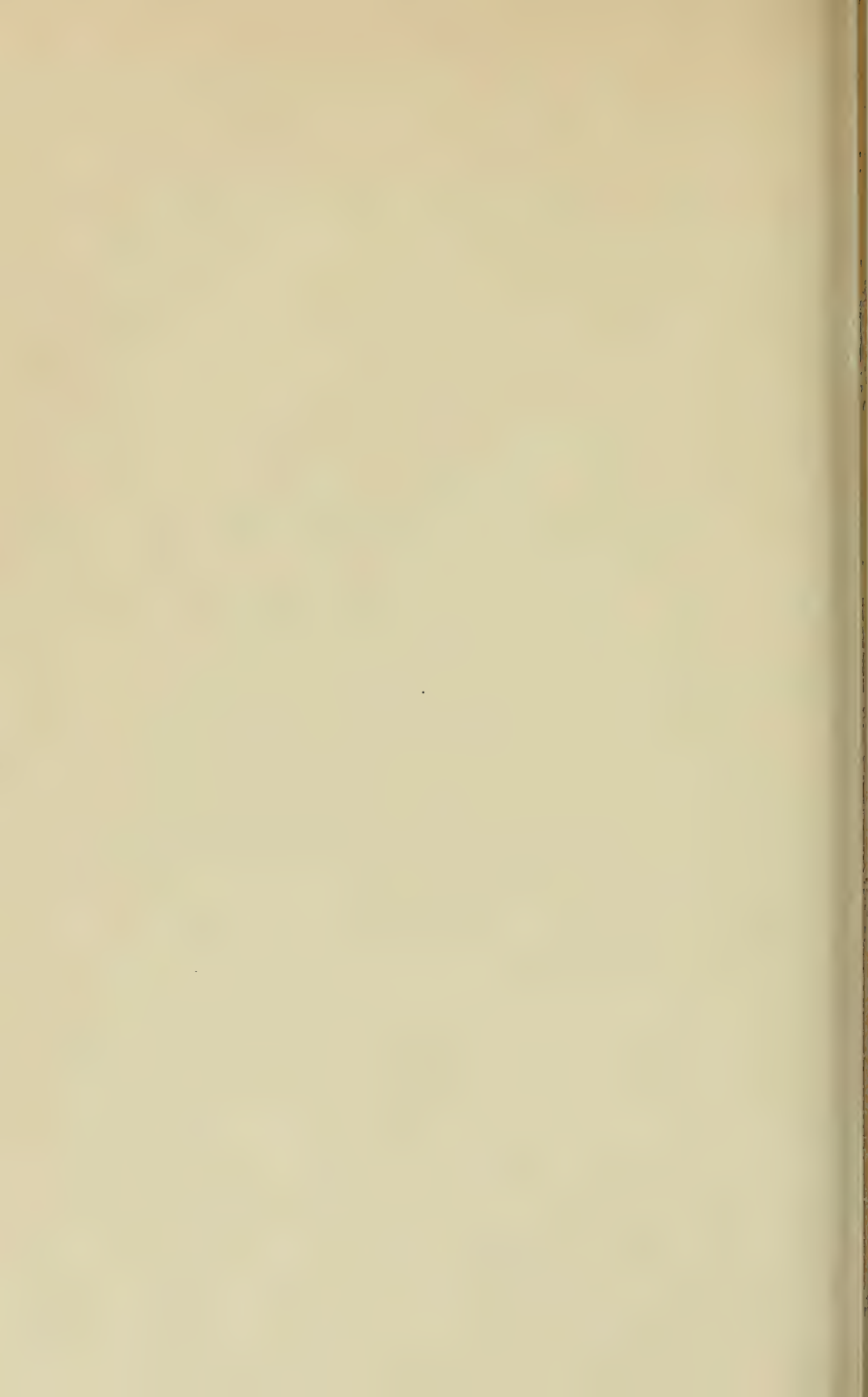
REPLY BRIEF FOR PLAINTIFF IN ERROR.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

FILED

MAR 29 1922

F. D. MONCKTON,
CLERK.



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REPLY BRIEF FOR PLAINTIFF IN ERROR.

While it is true that plaintiff in error concedes that there was probably a conflict of testimony upon the question of whether water came from the penstock prior to the slide, that conflict did not arise because of the matters and things referred to by the defendant in error in his brief. As stated in the opening argument, some witnesses including Mr. Hyle and Mr. Maynard, as well as others, testified to seeing what appeared to them from the streets of the town to be a stream coming from the flume. These witnesses, however, described a stream of such a character that it could not be a stream coming from the spout of the penstock. As stated in

the opening brief the spout of the penstock pointed north so that if a stream were coming from it the edge thereof only would be visible from the streets of the town, whereas each and all of the witnesses testifying to seeing the stream testified that the stream seen was one flowing in a westerly direction; that is to say, that it was such a stream that they looked into the face of it and could see the width of it. Now, there was a stream of water apparently coming from the flume that answered this description. It consisted, however, of surface water that was picked up by the snow sheds above the flume a short distance from the penstock and allowed to flow over the roof of the flume from whence it made its appearance as a stream of considerable magnitude spouting in the direction of the town. This stream looked like a stream coming from the flume to one standing on the streets of the city but was in fact a mere flow of surface water.

Several witnesses testified to this fact. Their testimony is well illustrated by that of Mr. Murphy who testified that he saw the water coming over the snow sheds and flowing down over the top of the flume for several days and that it appeared to him like water coming from the flume itself. That his office was right opposite the point where the water flowed and that he saw it daily; that he remained in this belief until he was told that this water was not coming from the flume at all but was surface water; that even then he was not satisfied but climbed to the flume level in order to investigate for

himself and found the statement to be correct. (See evidence Murphy, Rec. p. 840 et seq.)

The only reason that can be urged for the position that there was a conflict of testimony upon this question was that some of these witnesses spoke in a general way of the penstock as the point from which they saw the water flowing, and it was for this sole reason that it was conceded that there was probably a sufficient conflict in the testimony upon this question.

Counsel also refers to the testimony of Higgins, Noonan and others. These gentlemen actually did see water coming from the penstock before the buildings came down the hill side but not before the slide started. They saw the water coming from the penstock immediately prior to the time that the buildings came down the hill side and at least some time after the ground had started to move. Mr. Cook who was the only witness that saw the ground move prior to the time that the buildings came down, testified that he saw flashes at the point where the wires of the Gastineau Company and those of the Alaska Juneau Company crossed. That these flashes directed his attention to the hill side and while he was observing the hill side he saw a black crack where the ground had parted. This was several minutes before the buildings came down. (See evidence Cook, Rec. p. 750, et seq.)

As stated in the opening brief, it was the flashes observed by Cook that caused the short circuit which threw out the electric line that supplied the

current to the trommel screen motor. That these electrical disturbances occurred at the time indicated by Mr. Cook's testimony is evidenced by the testimony of the electrician in charge of the power house,—Mr. Bauzman, and the voltage chart which was offered in evidence and is printed as part of the record. (See evidence Bauzman, Rec. p. 908, et seq.)

While this was the time as shown by the testimony of the man in charge of the power house when the feeder or electrical circuit that supplied current for the trommel screen went out, electrical disturbances of a similar nature but which were not sufficiently violent to cause any of the feeders to go out, occurred earlier in the forenoon. In fact, three of these occurred between nine and ten o'clock.

Mr. Jackson the superintendent of the Gastineau Company testified he saw one of these flashes from his office in the Goldstein building; that he immediately called up the power house of the company and found that there had been a short circuit. (See evidence Jackson, Rec. p. 673, et seq.)

Mr. Clausen, the mill superintendent of the Alaska Juneau Company, observed three flashes between nine and ten and testified that there were short circuits following each flash. (See evidence Clausen, Rec. p. 731, et seq.)

There were other witnesses that testified to seeing these flashes and the witness Bauzman in charge of the power house testified that short circuits made their appearance at the time these flashes occurred.

These short circuits are registered on the voltage chart which is in evidence in the case as an exhibit. (See voltage chart, page 1064.)

All this testimony goes to show that the slides started at least as early as nine twenty-five in the morning. We are indulging in this discussion for the reason that we do not desire the court to receive an erroneous impression in regard to the situation as it actually was. The claim made by the plaintiff in error in its motion to direct a verdict and in its opening brief is that there was no evidence that the plaintiff in error was guilty of any of the specific acts of negligence charged in the bill of complaint or particulars, a matter that was fully discussed in the opening brief and to which no further reference will here be made, and also that even though it were conceded that the plaintiff in error was guilty of the negligent acts charged, the evidence conclusively shows that none of these acts contributed to cause the slide and the consequent damage. This question also was fully discussed in the opening brief and will not be further considered here. There is just one thing we wish to say in reply to statements of counsel in his brief upon this question: Counsel quotes from the testimony of the witness Crowther in which that witness testifies that in his opinion it would be good careful engineering to install a box to carry to a safe place any overflow water from the penstock. But this witness referred solely to penstocks that were used for the purpose of regulating the pressure in the pipe leading from

them so that the water might back up in them. Of course, in such a case a waste flume would be a necessity but this penstock was not such a penstock. As has already been shown in the opening brief, it was a mere device to get the water from a square container into a round container,—from a flume into a pipe. It was merely a part of the carrying system and as the pipe was larger than the flume the water could not back up and overflow. When that was made plain to Mr. Crowther he testified that no waste flume would under those circumstances be necessary. The testimony of the witness follows:

“Q. Yes, exactly that is what I mean. I am assuming the carrying capacity of the service pipe is larger than the carrying capacity of the flume and that the service pipe is not obstructed; that it is entirely open. There would not under these circumstances be any occasion for an overflow out of the penstock would there?

A. No, there would not.”

(See evidence Crowther, Rec. p. 156.)

At this point it must not be overlooked, however, that the negligence charged does not consist of not building a waste flume, but that it consists of not building a waste flume that would be installed for the purpose of carrying off water that might back up in the pipe and overflow.

Nor must the fact be lost sight of that the absence of the waste flume had nothing to do with the cause of the slide. All these matters were raised by motion to direct a verdict.

Coming now to the further point raised by the motion to direct a verdict: That there was no evidence of injury or resulting damage upon which the jury could base a verdict, we desire to say this in reply to what has been said by counsel for defendant in error: The first item discussed by counsel relates to the damage done to the store building. (See brief of counsel, page 5.) Counsel states in his brief that the plaintiff below testified that he based his estimate upon the cost of restoring the building to its original condition; that the repairs made necessary by the negligent acts of defendant below immediately after the damage had been inflicted would cause the amount mentioned, to wit, fifteen hundred dollars; that this was his best judgment based upon his experience and the result of investigation made by him of persons qualified to speak upon the subject.

But counsel's interpretation of Mr. Goldstein's testimony is erroneous. An examination of the record will show that the testimony of the witness does not admit of such interpretation. The plaintiff did not testify that he repaired the building and he did not testify as to what it would cost to repair it. What he testified to was what in his judgment was the damage done to the building, or, as he puts it "the value of the damages". The testimony of the plaintiff upon this subject is as follows:

"Q. You may use that in describing the different values.

A. You mean the value of the property or the value of the damages. I estimated the value

of the damage done to the property.

Q. Give us the estimated damage.

A. The damage I consider done to the store building was fifteen hundred dollars.

Q. How did you arrive at that figure?

A. I estimated the value of it.

Q. What did you base that estimate on?

A. What it cost to do the work at the present time or did at the time of the slide.

Q. Have you made inquiries as to what it would cost?

A. I have made inquiries of different carpenters."

(See evidence Goldstein, Rec. p. 207.)

It will be seen, therefore, that no evidence was offered by plaintiff whatsoever upon the question of the cost of repair and no evidence was offered to show of what the damage or injury to the building consisted so that the jury might have some idea of what had happened to the building. The plaintiff was simply asked to invade the province of the jury and give an estimate not of what it would cost to repair the building but of what the damage had been. There was no chance in the world for the plaintiff in error to call witnesses to rebut this kind of testimony. No builders could be called to say what the repairs could be made for because there was no evidence of what the injury consisted.

Defendant in error charges that no objection was made to this evidence. Aside from the fact that this evidence might be competent and proper enough to be introduced in a preliminary way to be followed by some real evidence upon the subject, the fact that the evidence was not objected to does not add

to its weight. It merely waives any objection to its competency or relevancy or materiality. As was stated by the Supreme Court of North Dakota in the case of American Coal Briquetting Company v. Minneapolis, St. Paul and S. S. M. Ry. Co., 170 N. W. 570, cited on page 57 of the opening brief:

“While the failure to object may constitute waiver of the incompetency of the evidence it is not a waiver of the right to question its legal effect or its legal sufficiency.”

On page 5 of the brief it is further contended by counsel for the defendant in error that if there was any insufficiency in the testimony on the part of his client it might have been supplied by cross-examining the witness Goldstein. Surely the duty does not rest upon the opposing party to prove the plaintiff's case by cross-examining his witnesses. Furthermore, had such attempt been made under the laws of Alaska where the strict rules of cross-examination obtain, an objection to the questions asked would have been properly sustained on the ground that it was not cross-examination.

Coming now to the authorities cited by counsel under this particular head.

It is contended by counsel that the proper measure of damages is the cost of repair. Why he should so contend it is difficult to conceive because there is no evidence in the record to show what the cost of repair would be. Nor can it be said that the cost of repair would in all cases be the proper measure of damages. Whether it would or not

would depend largely upon the question of what the extent of the damage was and the circumstances and conditions under which it occurred.

If the extent of the damage were great and the structure injured one that was practically worthless, clearly the costs of repair would not be a proper measure of damage. To illustrate: A building situated in a mining camp, such as Juneau, may be of far greater value one day than it is the next. The opening up of a new mine or the closing down of an existing mine directly affects the value of the neighboring property. What may be a valuable building in the mining camp today may be practically worthless a week hence. Clearly under these circumstances, the cost of repair would not be the measure of damages of a building that had so become worthless.

Juneau is a mining camp. In all mining camps the values of property fluctuate. So that unless the damage is trifling the just and reasonable measure of damage would be the difference in market value before the injury and after the injury.

Nor is the cost of repair ever regarded as the proper measure of damages unless the extent of the injury can be clearly shown and the facts relative thereto demonstrated in such a way that the cost may be accurately estimated and a review of the cases cited by counsel will show that wherever the cost of repair has been held to be a proper measure of damages, all these details were clearly shown in evidence, so that the jury could clearly see just what had to be repaired.

The first case cited by counsel is *Watson v. Pacific Power Company*, 156 N. W. 186.

In this case the court not only uses the language quoted by counsel but adds to it other qualifying phrases. The trial court had instructed the jury that the measure of damages was the reasonable cost of restoring the injured buildings to the condition they were in immediately before the injury. It was contended that this was error and that the true measure of damages was the difference between the value of the property immediately before and immediately after the injury. The court say:

“The measure of damage for injury to real property is not invariable and there may be circumstances under which either of the rules stated would be applicable. The rule stated by appellant is more often applied where the damage is permanent or can not well be expressed in specific items of injury capable of easy repair or remedy, but does affect in some substantial degree the value of the property as a unit. But where the injury is susceptible of remedy at moderate expense and the cost of restoring it may be shown with reasonable certainty, the rule given the jury by the trial court is entirely proper.”

It will be observed, therefore, that under this decision the measure of damages would be the difference in market value unless the injury is susceptible of remedy at moderate expense and the cost of restoring it may be shown with reasonable certainty. And again that the rule to the effect that the difference in market value is the measure of damages is applicable where the damage is perma-

ment or can not well be expressed in specific items of injury capable of easy remedy or repair.

Surely there is nothing in the evidence in this case showing any specific items of injury capable of easy repair or not capable of easy repair; nor is there anything here to show that the cost of restoring it may be shown with reasonable certainty. Nor is there any evidence as we have already pointed out to show what the actual cost of repair would be, the plaintiff's testimony being nothing more nor less than an estimate of the damages and not a statement of what the cost of repair would be.

Referring to the second item of damage, that which was done to the merchandise, dealt with on page 6 of defendant in error's brief, the witness Goldstein on cross-examination testified in answer to questions as follows:

“Q. The items of damaged stock you had in there—do you remember what particular articles of merchandise were damaged in the store—not in the warehouse now—in the store?

A. I wouldn't say the particular items, no.

Q. Did you make a list of those things that were damaged at that time?

A. I did not.

Q. And your estimate as to what the estimate was is a mere estimate?

A. A mere estimate.

Q. You wouldn't be able to tell us now what that damage consisted of, that is to say, what the articles were that were damaged?

A. No.

Q. You don't know whether it was tins or bulk?

A. I know it was all included in that. I don't know just the particular stuff I lost there

—I don't know the articles—I know some of them but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment fifteen hundred dollars?

A. I don't know whether it was fifteen hundred. I read it off the list here.

Q. Fifteen hundred is my recollection.

A. Twenty-five hundred.

Q. That twenty-five hundred, is that damage to the stock in the store?

A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done—I wouldn't come here on oath and testify how much damage was done because there is no way of figuring it up—because that stuff was going right out of the front door and I didn't stand there in the door as it went out of the store.

Q. You don't know what it was that went out at that time?

A. I do not, no sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it, is that right?

A. I would not.

Q. And that is true of the other things you have spoken of?

A. It is."

(See evidence Goldstein, Rec. p. 212 et seq.)

Now, it may be true enough in a case like this a plaintiff may recover even though he can not furnish an itemized list of articles damaged or lost, but he must show something. It will not do for him to say "I don't know what I lost, but I

think I should recover whatever amount I have on my list here" whether it is fifteen hundred or twenty-five hundred. If a party comes in as was done in the case cited by counsel, to which further reference will be later on made, brings in an inventory, books of account and other evidence showing what property was there before the injury, and an inventory or other evidence showing what was there after the injury, so there may be some way of arriving at what the missing property in a general way at least consisted of and what its value was, and further shows such facts as are within his reach in relation both to the character of the property and its market value, then the opposing party may be able to rebut the testimony offered showing that property of such character was worth less. But here we have a case where no attempt whatsoever is made to show what was lost or injured, although the witness Goldstein testified that he knows what some of the articles were and surely he must have had inventories and invoices to show in a general way what if anything was lost.

The testimony of the witness simply amounts to this: He said: I do not know what I lost; I will not swear as to what my loss consisted of, and I do not know whether it is fifteen hundred dollars or some other amount, but I think I should recover fifteen hundred dollars or twenty-five hundred dollars. The record leaves the testimony of the witness in doubt upon this point.

Referring to the first case cited by counsel under this head—Union Pacific R. Co. v. Lucas, 136 Fed. 374:

It will be observed that while the witness in that case testified to the value of his stock in a lump sum, testimony had already been offered to the effect that he was the manager of the business, knew the value of the stock, and that his last inventory which had been carefully made was destroyed in the same fire; that he could not give the items of which the stock consisted in detail. Here was a case where the entire stock had been destroyed, where the witness had in mind an inventory carefully made, so that he would know the exact value of the stock as a whole, and he was permitted to testify what that was. Surely that is not the situation in the case at bar. The witness in the case at bar says that he does not know what the items destroyed were except as to some of them, and as to what these items were concerning which he had knowledge he does not testify. No evidence is offered that he had taken an inventory that had given him information concerning such articles, or that he had in fact any knowledge concerning them, he himself making the statement that he would not swear whether it was fifteen hundred dollars or was not fifteen hundred dollars that he lost.

Referring to the case of Coleman v. Retail Lumbermen's Association, 75 N. W. 588, the next case

cited by counsel, we find this citation as shown by the opinion on page 589:

“For the purpose of proving the amount on hand just prior to the fire, plaintiff proved the amount on hand on January 1, 1896, when an inventory of the stock on hand was taken; he then proved his books of account in the manner provided by Section 5738, General Statutes 1894, and introduced them in evidence for the purpose of showing the amount of lumber since purchased and the amount since sold.”

The opinion further says that an inventory was taken after the fire and that the amount of lumber destroyed was thus determined.

If any such procedure had been followed in the case at bar there would have been no ground of complaint.

In the case of *Jensen v. Palatine Insurance Company*, 116 N. W. 286, the third case cited by counsel under this head, the court seemed to hold that the rule stated by them in the opinion quoted by counsel applies only where there is a total loss of property and not where there is a partial loss. There had been a previous decision by the same court in which a rule seemingly different from that adopted by the court in this case had been adopted, but the court distinguished that case from the case then under consideration upon the ground that in the former case the loss was not total but merely partial. The court say after using the language quoted by counsel:

“The defendant insists that a different rule was adopted by this court in *British American*

Insurance Company of New York v. Columbian Optical Company, 108 N. W. 130. In that case there was not a total loss."

Referring now to the third item: Damage done to the warehouse.

The testimony of the witness upon this item is as follows:

"Q. Go ahead.

A. Warehouse damages fifteen hundred dollars. I had to rebuild that.

Q. How much did it cost to rebuild it.

A. It cost me—well it isn't finished yet—I have spent about seven hundred dollars on it so far but it is just about half completed—haven't been able to finish it up."

That is the extent of the testimony upon that item. The witness says he had to rebuild it; that he had spent about seven hundred dollars on it so far, and that it is about half completed, but he does not shed any light on the character of building it was,—whether it was a large building or a small building; whether it was made of wood or stone; whether it was old or new; how long it had been in use or in what condition of repair it was. The fact that it cost fourteen hundred dollars to rebuild it did not necessarily mean that the witness was damaged fourteen hundred dollars. If he had an old shack in the first place, it might not have been worth a hundred dollars and he would not be in a position to ask the plaintiff in error to pay him the price of a new building. On the other hand, if he had a new building in the first place, one that had

just been erected and no conditions existed in the community which had taken the value out of the property itself, there may be reason for saying that he would be entitled to what it cost to rebuild it. But even then, under the authorities, where the building was entirely destroyed the measure of damages would be its market value and not the cost of repair or reconstruction. And in any event it was necessary to show what the character of building was before the slide and why it was worth something.

Counsel cites the case of *Kennedy v. Treleaven*, 175 Pac. 977, to show that market value is not always the true measure of damages in cases where property is destroyed. In that case, however, the court used this language:

“It is frequently said that the market value of the property destroyed at the time and place of the fire is a proper measure and this is true if the property in fact had a market value. If there be no market value then another criterion of value must be found and the best evidence that can be obtained must be produced to show the elements which enter into the real value.”

What elements entering into the real value did the plaintiff prove in this case?

The only description we have of the building lost is that it was a warehouse. Clearly, the law of this case is not altogether applicable. The court, in this decision, also referred to *Ruling Case Law*, Volume 8, page 485, where, after stating that recovery may be had either for damage to the freehold or to the property in its detached form, it said:

“If recovery is sought for the value of the property destroyed in its detached form the measure of damages is its market value when so detached.”

In this same volume of Ruling Case Law, Section 186, which deals with value and injuries to property generally after stating how market value must be proven if the property has a market value, the rule is laid down giving the proof that must be offered in cases where property has no market value in the following words:

“If an article has no market value its worth may be shown by proof of such elements or facts affecting the question as may exist, such as its cost, its utility and use, and the extent to which it has deteriorated, if any.”

The next item of damage dealt with in the brief of counsel is the damage to the apartment house. Counsel *assumes* that the evidence shows that this apartment house was totally destroyed; that it cost the defendant in error eight thousand dollars, and that eighty-five hundred dollars was the cost of its reconstruction. The statement is further made that the building was comparatively new. The trial court in its opinion rendered upon the motion for a new trial fell into the same error with reference to the destruction of the apartment house. The evidence given by the witness Goldstein upon this question is as follows:

“Q. Go ahead.

A. The apartment house on the hill was eight thousand five hundred dollars.

Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I have had estimates from carpenters what it would cost to rebuild that property and there was fixtures in the apartment house, two thousand dollars, there were four five-room apartments."

(See evidence Goldstein, Rec. p. 208.)

On cross-examination the witness testified:

"Q. The buildings, how much did they cost you?

A. I don't remember what that was either but I know the apartment house cost me about eight thousand dollars.

Q. And as to the rest of the buildings, you don't know?

A. I don't know.

Q. When was the apartment house built?

A. 1913, I think it was 1913 or 1914.

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all the time?

A. Not all of the time; they were moving in and out of it nearly all the time.

Q. It had been used as a building for rent?

A. Yes, sir."

(See evidence Goldstein, Rec. p. 214.)

Now, there is nothing in this testimony to show that the apartment house was destroyed by the slide either partially or otherwise, and, on the contrary, the evidence of Mr. Hargreaves, a witness quoted by the plaintiff in error, is to the effect that it was not damaged very much. After testifying that he made a survey on May 21st, following the slide, he testified (referring to a map in evidence) as follows:

“Q. The buildings between Gastineau Avenue and Front Street that you have indicated there, what do they indicate?

A. Indicates buildings as they were before the slide as near as I could get the information; and *the real black ones, they were there at the time I surveyed the ground*, with the exception of one—one has since been torn down.

Q. The two buildings in black lines, they were there at the time you made your survey?

A. Yes.

Q. When was that?

A. May 21st.

Q. What is this little building above the black line?

A. That is still there.

Q. Do you know what that was?

A. A little shack.

Q. *What is the other one down below that?*

A. *It appears to be a series of shacks or apartments—a long row of buildings.*

Q. *That is one of Mr. Goldstein's apartment houses?*

A. *So I understand.”*

Whether the building was destroyed or not is a question at least left in doubt by the testimony. There is no evidence to show what kind of a building it was, of what material it was constructed, what its condition of repair was. Instead of being new the witness Goldstein has testified it was built in 1913 or 1914. A wooden building of that age would be pretty well used up unless kept in repair, especially when rented to tenants that constantly moved in and out as Mr. Goldstein said his tenants did. The only thing the witness testifies to in regard to the building is that it had five apartments.

Now how can any one say from the evidence whether the estimate that Mr. Goldstein received from carpenters touching cost of rebuilding the apartment house was correct or not. The carpenters were not called; no one having special knowledge upon the subject of cost of construction was called to testify. There was not a word of evidence showing to what extent the building had deteriorated, if at all. Mr. Goldstein merely comes in and asks the court to allow him eighty-five hundred dollars which he says is the amount according to the estimates of carpenters to whom he has talked that it will cost to give him a new building. He admits the building only cost him eight thousand dollars and that this included all the fixtures for which he now seeks two thousand dollars extra. This would leave the cost of the building minus the fixtures six thousand dollars. No excuse is given why he should be paid twenty-five hundred dollars more than the building originally cost him when it was new. The whole thing is left to conjecture.

The next item referred to by counsel in his brief on page 9 deals with the value of the fixtures and the furniture in the apartment house. The witness Goldstein gave an itemized list of those articles and estimated the value of each article but he did not testify concerning the condition of repair the articles were in, whether they were old or new, good or bad. On cross-examination he testified he did not know the cost of the articles, the testimony being as follows:

“Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you say it did or which you estimate it was worth at the time of the slide?

A. I estimate it was worth that at the time of the slide.

Q. But it cost you less than that didn't it?

A. I don't know whether it did or not; I don't know what I did pay for it.”

(See evidence Goldstein, Rec. p. 214.)

And again on cross-examination, the witness testified after testifying that the apartment house had cost him eight thousand dollars:

“Q. That included the plumbing and the plumbing fixtures and everything like that?

A. Yes, sir.”

(See evidence Goldstein, Rec. p. 215.)

Whether the plaintiff is seeking a double recovery, —one for the value of the fixtures in the apartment house and another for the value of the fixtures separated from the apartment house, is not clear. In any event there is no testimony on the question of whether there was any salvage; no question touching the extent of the injury done to this furniture or fixtures; no testimony as to what its condition was at the time of the injury if injured, and no competent evidence of its market value.

On page 9 of his brief defendant in error's counsel makes the statement that the various items heretofore referred to were the only ones to which the plaintiff in error made objection. In this connection it must be understood that the other items re-

ferred to in the complaint and bill of particulars had already been ruled out by the trial court before this writ of error was sued out. A motion for a new trial had been made and the trial court held that there was no evidence to support a verdict for damages as far as any of the other items mentioned were concerned, and for that reason the sufficiency of the evidence touching those items has not been discussed.

The character of the other cases cited by counsel may be shown by reference to one or two of them. The case of *Chicago and E. Ry. Co. v. Ohio City Lumber Company*, 214 Fed. 751, for instance, was a case where two men had made a detailed inventory of the property after the fire which were included in proofs of loss to the insurance company. These proofs of loss purported to give statements in detail of the lumber, glass, hardware and other property which was burned. In making out these statements the parties had before them the inventory, the books of record, the original invoices and all that sort of data and the question was whether these statements could be used after the original data from which they had been made up had been inadvertently destroyed. (See page 756 of the opinion.)

Several cases are cited to show that the witness Goldstein might be qualified to express an opinion of the value of the various items of property destroyed, but no cases hold that any witness, Mr. Goldstein or any one else, is qualified to express an

opinion touching the value of articles without knowing what those articles are.

Counsel quotes from Wigmore on Evidence, section 117, to show that a person familiar with his own property may under certain circumstances be allowed to estimate its worth even though he would not be otherwise qualified. He inadvertently, however, has omitted a parenthetical expression occurring in the text.

According to counsel's brief the text reads:

"The weight of his testimony may be left to the jury."

The language of the text is:

"The weight of his testimony (which often would be trifling) may be left to the jury."

However, that may be, neither Wigmore nor any other authority has held that such cases as are contained in this record are evidence either of injury or damage.

In completing his brief counsel calls the court's attention to the fact that the record fails to show that the plaintiff in error at any time objected to the testimony given by the defendant in error upon the amount of damages sustained by him and that the defendant freely entered upon the cross-examination and did not offer any testimony showing or tending to show that the several amounts testified to by the defendant in error were merely speculative, false or fanciful. In reply to this we desire to say that the plaintiff in error objected to the sufficiency

ments upon the fact that no evidence was offered to rebut the testimony of the plaintiff but in that case a detailed description of the character of the property lost was before the court, and this consisted at least in large part of staple articles of merchandise. Of course, it would be easy under those circumstances to disprove any value that might be placed upon those articles if it was too high, but as already shown that is not the situation in the case we are now discussing.

We have considered these matters at some length and have probably been obliged to repeat some things already stated in the opening brief. We ask the court to indulge us in this regard, as this was made necessary by the fact that we were unable to present an oral argument, which of course would have been far more satisfactory, and would have enabled us to point out more in detail the objections which we have set forth in this and in the opening brief.

For the reasons we have stated, we think the judgment of the lower court should be reversed and a new trial granted.

Dated, Alaska,

March 22, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELUY MILLICH alias "CHARLES MILLER"
and JOHN ENGBLAD,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

FILED
FEB 4 - 1922
F. D. MONCKTON,
CLERK

United States
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ELUY MILLICH alias "CHARLES MILLER"
and JOHN ENGBLAD,
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District of Alaska, Division No. 1.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Assignment of Errors.....	67
Bill of Exceptions.....	8
Bond on Writ or Error.....	60
Certificate of Clerk U. S. District Court to Transcript of Record.....	75
Citation on Writ of Error.....	63
Demurrer	9
Demurrer Overruled and Plea of Not Guilty..	7
Indictment	1
Judgment and Sentence	57
Motion in Arrest of Judgment Notwithstanding the Verdict.....	53
Motion for New Trial.....	54
Names and Addresses of Attorneys of Record..	1
Order Allowing and Settling Bill of Exceptions	56
Order Extending Time Sixty Days to Complete and File Record on Appeal (Dated July 15, 1921)	69
Order Extending Time Ninety Days to Complete and File Record on Appeal (Dated September 7, 1921).....	70

Index.	Page
Order Extending Time Forty Days to Complete and File Record on Appeal (Dated November 22, 1921).....	71
Order Extending Time to and Including January 10, 1922, to Complete and File Record on Appeal (Dated December 16, 1921)....	73
Petition for Writ of Error.....	58
Praecept for Transcript of Record.....	74
TESTIMONY ON BEHALF OF THE GOVERNMENT:	
GLEASON, RICHARD H.....	10
Cross-examination	13
O'BRIEN, J.....	16
Cross-examination	21
TESTIMONY ON BEHALF OF DEFENDANTS:	
BARBER, E. L.....	23
Cross-examination	30
DWYER, GERALD O.....	33
Cross-examination	34
Redirect Examination.....	35
Recross-examination	36
ENGBLAD, JOHN	47
Cross-examination	49
JOHNSON, WALTER	50
McCLOSKEY, JAMES.....	36
Cross-examination	37
MILLER, CHARLES	38
Cross-examination	39
Redirect Examination	40
Recalled	50

Index.

Page

TESTIMONY ON BEHALF OF DEFEND-
ANTS—Continued:

MILLINGSON, A. J.....	41
Cross-examination	42
ROBERTS, DICK	45
Cross-examination	46
Verdict	52
Writ of Error.....	65



Names and Addresses of Attorneys of Record.

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Alaska,

Attorneys for Plaintiffs in Error.

A. G. SHOUP, U. S. Attorney, Juneau, Alaska,
Attorney for Defendant in Error.

District Court for the District of Alaska, Division
No. One.

THE UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* CHARLES MILLER, and
JOHN ENGBLAD.

Indictment.

Alaska Bone Dry Law, Sec. 12 of Selective Service
Act, and Sec. 3242, R. S.

At the Special February term of the District Court
of the United States of America, within and for the
District of Alaska, in the year of our Lord one
thousand nine hundred and twenty-one, begun and
held at Juneau, in said District, beginning Feb-
ruary 21, 1921.

COUNT ONE.

The Grand Jurors of the United States of
America, selected, empaneled, sworn, and charged
within and for the District of Alaska, accuse ELUY
MILLICH, *alias* CHARLES MILLER, and JOHN
ENGBLAD by this indictment of the crime of

ILLEGAL POSSESSION OF INTOXICATING LIQUOR, committed as follows:

The said Eluy Millich, *alias* Charles Miller, and John Engblad, at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on the ninth day of December, in the year of our Lord one thousand nine hundred and twenty, did, in and on the premises known as Alaskan Cafe, adjoining the Alaskan Hotel on the west and being on the north side of Front Street, then and there, knowingly, wilfully and unlawfully have in their possession certain intoxicating liquor, to wit, whiskey containing more than one-half of one per centum of alcohol by volume, the exact amount of said whiskey being unknown to the Grand Jurors is not herein stated, contrary to the form of the statutes in such cases made and provided.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say:

That Eluy Millich, *alias* Charles Miller, and John Engblad did then and there commit the crime of illegal possession of intoxicating liquor, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and [1*] dignity of the United States of America.

COUNT TWO.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged

*Page-number appearing at foot of page of original certified Transcript of Record.

within and for the District of Alaska, further accuse Eluy Millich, *alias* Charles Miller, and John Engblad by this indictment of the crime of illegally selling intoxicating liquors, committed as follows:

The said Eluy Millich, *alias* Charles Miller, and John Engblad, at the City of Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on the ninth day of December, in the year of our Lord one thousand nine hundred and twenty, in and on the premises known as the Alaskan Cafe, adjoining the Alaskan Hotel on the west and being on the north side of Front Street, did, then and there, wilfully and unlawfully sell to Richard H. Gleason intoxicating liquor, to wit, whiskey containing more than one-half of one per centum of alcohol by volume, the exact amount of said whiskey being unknown to the Grand Jurors is not herein stated.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say:

That Eluy Millich, *alias* Charles Miller, and John Engblad did then and there commit the crime of illegally selling intoxicating liquors, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT THREE.

And the Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, further

accuse Eluy Millich, *alias* Charles Miller, and John Engblad by this indictment of the crime of carrying on the business of a retail liquor dealer without having paid the special tax, committed as follows:

That heretofore, to wit, on the ninth day of December, in the year of our Lord one thousand nine hundred and twenty, the said [2] Eluy Millich, *alias* Charles Miller, and John Engblad, at or near Juneau, within the said District of

3242
R. S.

Alaska, and within the jurisdiction of this Court, and in and on the premises known as the Alaskan Cafe, adjoining the Alaskan Hotel on the west and being on the north side of Front Street, did, then and there, knowingly, wilfully, unlawfully and feloniously carry on the business of retail liquor dealers by then and there selling and offering for sale distilled spirits in quantities less than five gallons without having first paid the special tax, as required by law.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say:

That Eluy Millich, *alias* Charles Miller, and John Engblad did then and there commit the crime of carrying on the business of a retail liquor dealer without having paid the special tax, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT FOUR.

And the Grand Jurors of the United States of

America, selected, empaneled, sworn, and charged within and for the District of Alaska, further accuse Eluy Millich, *alias* Charles Miller, and John Engblad by this indictment of the crime of illegally selling intoxicating liquor, committed as follows:

The said Eluy Millich, *alias* Charles Miller, and John Engblad, at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on the ninth day of December, in the year of our Lord one thousand nine hundred and twenty, in and on the premises known as the Alaskan Cafe, adjoining the Alaskan Hotel on the west and being on the north side of Front Street, did, then and there, wilfully and unlawfully sell to James O'Brien for intoxicating beverage purposes intoxicating liquor, to wit, whiskey containing more than one-half of one per centum of alcohol by volume, the exact amount of said whiskey being unknown to the Grand Jurors is not herein stated.

And so the Grand Jurors duly selected, empaneled, sworn, and [3] charged as aforesaid, upon their oaths do say:

That Eluy Millicn, *alias* Charles Miller, and John Engblad did then and there commit the crime of selling intoxicating liquor, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT FIVE.

And the Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, further

accuse Eluy Millicen, *alias* Charles Miller and John Engblad by this indictment of the crime of selling intoxicating liquor to a member of the military forces of the United States while in uniform, committed as follows:

The said Eluy Millich, *alias* Charles Miller, and John Engblad, at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on the ninth day of December, in the year of our Lord one thousand nine hundred and twenty, in and on the premises known as the Alaskan Cafe, adjoining the Alaskan Hotel on the west and being on the north side of Front Street, did, then and there, wilfully and unlawfully sell to Richard H. Gleason certain intoxicating liquor, to wit, whiskey, the said Richard H. Gleason being then and there a member of the military forces of the United States and the said Richard H. Gleason being then and there in uniform of the United States Army, in violation of Section 12 of the Selective Service Act, being the Act of Congress approved May 18, 1917.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say:

That Eluy Millich, *alias* Charles Miller, and John Engblad did then and there commit the crime of selling intoxicating liquor to a member of the military forces of the United States while in uniform, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and pro-

vided, and against the peace and dignity of the United [4] States of America.

JAMES A. SMISER,
United States Attorney. [5]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1452-B.

UNITED STATES OF AMERICA,
vs.

ELUY MILLICH, *alias* CHARLES MILLER, and
JOHN ENGBLAD.

Demurrer Overruled and Plea of Not Guilty.

Demurrer overruled. S. Hellenthal, Esquire, represents the defendants above named. Plea of Not Guilty entered. United States Attorney James A. Smiser is present on behalf of the plaintiff.

(Dated Wednesday, March 9, 1921 — Court Journal No. H, page 379.)

(Journal signed, "Jennings, District Judge.")
[6]

Filed in the District Court, District of Alaska,
First Division. July 13, 1921. J. W. Bell, Clerk.
By ———, Deputy.

Filed and presented this 13th of July, 1921.

ROB'T W. JENNINGS,
Judge.

In the District Court for the District of Alaska,
Division Number One.

Case No. 1452-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ELUY MILLICH, *alias* "CHARLES MILLER,"
and JOHN ENGBLAD,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the 21st day of March, 1921, this cause came for trial before the above-entitled court and a jury duly empanelled and sworn upon the indictment herein upon each of the counts therein contained, the defendants having filed a demurrer to each of said counts and having urged upon the hearing on said demurrer that the revenue act, and particularly section 3242, R. S., upon which count three was based, had been repealed, which said demurrer is in words and figures as follows, to wit:

"In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* CHARLES MILLER, and
JOHN ENGBLAD,
Defendants.

Demurrer.

COMES NOW the defendants and demur to the First Count of the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

And further demur to Count Two of the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

And further demur to Count Three of the complaint herein for the reason that the same does not state facts [7] sufficient to constitute a cause of action.

And further demur to Count Four of the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

And further demur to Count Five of the complaint herein for the reason that the same does not state facts sufficient to constitute a cause of action.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants.

Copy received this 26th day of February, 1921.

JAMES A. SMISER,

District Attorney."

—which demurrer was overruled by the Court by an order made March 9, 1921, which order is in words and figures as follows, to wit:

Case No. 1452-B.

“UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* CHARLES MILLER, and
JOHN ENGBLAD.

Demurrer Overruled and Plea of Not Guilty.

Demurrer overruled. S. Hellenthal, Esquire, represents the defendants above named. Plea of Not Guilty entered. United States Attorney James A. Smiser is present on behalf of the plaintiff."

The defendants having plead not guilty, the following testimony was heard and proceedings had: [8]

Testimony of Richard H. Gleason, for the Government.

RICHARD H. GLEASON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SHAFNER.)

Q. Your name is Richard H. Gleason?

A. Richard H. Gleason.

Q. What is your occupation?

A. Telegrapher, United States Army.

Q. How long has that been your occupation?

A. The last time, May 20, 1920.

Q. Since May 20, 1920, have you been continuously a member of the United States Army?

A. I have, and I am now.

Q. Were you in the premises known as the Alaskan Cafe, next to the Alaskan Hotel, in the city of Juneau on December 9, 1920? A. I was.

Q. Who were with you there?

A. James O'Brien.

Q. What did you do when you were in there?

(Testimony of Richard H. Gleason.)

A. Purchased some drinks.

Q. What kind of drinks?

A. Supposed to be whiskey.

Q. What was it—was it whiskey?

A. To my belief and knowledge it was.

Q. Was it intoxicating? A. It was.

Q. How much did you buy?

A. I couldn't tell that.

Q. Did you buy more than one drink?

A. Yes, sir. [9]

Q. From whom did you buy them?

A. The tall fellow over there.

Q. This man sitting next to Mr. Hellenthal—on
Mr. Hellenthal's right? A. Yes, sir.

Q. Where was it when you bought it?

A. Behind the bar.

Q. And you and Mr. O'Brien were on the other
side of the bar? A. In front of it.

Q. What did you ask for when you went in there?

A. For a drink.

Q. How were you dressed at that time?

A. In uniform.

Q. In the uniform of the United States Army?

A. Yes, sir.

Q. Had you ever purchased any liquor there at
any other time? A. No, sir.

Q. How much did you pay for it?

A. Fifty cents a drink.

Q. Can you tell us about how many drinks you
had there?

A. We were in there from about 3 o'clock until

(Testimony of Richard H. Gleason.)

about 5, drinking right along.

Q. Purchasing drinks pretty steadily?

A. We were.

Q. Where did the bartender get the liquor that he served you, do you know?

A. Behind the bar,—it was poured out behind the bar,—I don't know.

Q. Did he have to go out and get it anywhere?

A. No.

Q. It was right there somewheres within reach?

[10] A. Yes, sir, it was.

Q. And Mr. Engblad was there all the time?

A. He was there part of the time.

Q. He was there all of the time or part of the time?

A. He was there at the start, and the other man was there.

Q. Mr. Miller was there? A. Yes.

Q. Were any of those drinks sold you by Mr. Miller? A. One or two rounds.

Q. It was the same kind of liquor that you testified to? A. It was.

Q. Served in the same manner? A. Yes, sir.

Q. And at the same price? A. Yes, sir.

Q. Did you buy any other liquor there—other drinks there that day? A. By the bottle.

Q. How much did you buy that way?

A. It was a pop bottle—a soda pop bottle.

Q. About how large was it?

A. I should judge about half a pint.

Q. How much did you pay for that?

(Testimony of Richard H. Gleason.)

A. I think it was \$3.50.

Q. What did that contain?

A. Supposed to contain whiskey.

Q. Was it whiskey?

A. To my knowledge it was.

Q. Was it intoxicating?

A. Well, we were drinking it all afternoon.

Q. Was it intoxicating? [11]

A. Yes, I guess,—

Mr. SHAFNER.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You went there about 3 o'clock, you say—isn't it a fact that you didn't go in there until about 4?

A. No, sir; 3 o'clock.

Q. Was Mr. O'Brien in there when you went in there? A. He was.

Q. He went in with you? A. Yes, sir.

Q. Before that time you had had some liquor?

A. Four drinks; yes, sir.

Q. Four drinks before you came in there?

A. Yes, sir.

Q. Isn't it a fact you had more than four drinks of moonshine? A. No, sir, it is not.

Q. You had four drinks of moonshine before you came in there? A. Yes, sir.

Q. And you say you came in there about 3 o'clock?

A. About 3 o'clock when we came in there.

Q. It couldn't have been as late as 5:30 when you came in there? A. No, sir; we were home then.

(Testimony of Richard H. Gleason.)

Q. And you left at 5 o'clock? A. Yes, sir.

Q. And that is the last time you were there that day? A. No—that night after supper.

Q. You were never in that place before that day?

A. I was not.

Q. And you were never in there after that day?

A. Yes, sir. [12]

Q. And you say Mr. Engblad sold you all the liquor except what Mr. Miller sold you?

A. Yes; and another man was tending bar after Mr. Miller left—I don't know what his name is.

Q. How many drinks did you say that Mr. Miller served you?

A. I don't know how many. He served us, and then Mr. Miller.

Q. You said that he served you two—one or two?

A. No, more than that.

Q. Mr. Miller served you more than two drinks?

A. Oh, no, not Miller.

Q. Was Mr. O'Brien in there with you?

A. Yes, sir.

Q. He was in the building with you?

A. Yes, sir.

Q. And drank with you?

A. He was in there with me; yes, sir.

Q. Isn't it a fact you were drunk when you came to the Alaskan? A. I was not.

Q. You were not drunk? A. I was not.

Q. The four drinks of moonshine had not had any effect? A. No, sir.

Q. They had not had any effect at all upon you?

(Testimony of Richard H. Gleason.)

A. No, sir.

Q. And you say Mr. Miller served you one or two drinks? A. Something like that.

Q. Was Mr. Miller behind the counter at that time? A. He was behind the bar; yes, sir.

Q. There is a restaurant in that place, isn't there?

A. I never seen any restaurant. [13]

Q. You didn't see any restaurant? A. No, sir.

Q. If there is a restaurant there you didn't see it? A. I didn't see no restaurant.

Q. And you say you left there about 5 o'clock?

A. Around that, yes.

Q. And during this time Mr. O'Brien had been with you all the time since he came in there?

A. He was in there; yes, sir.

Q. And he came in with you?

A. He came in with me; yes, sir.

Q. At the time you came there those four drinks you had had before had not had any effect upon you?

A. Did not.

Q. Did they have any effect upon you after you were in there?

A. We were drinking right along in there.

Q. You were drinking in there? A. Yes, sir.

Q. But the moonshine you had before that did not affect you? A. It did not.

Q. Not that you know of? A. No, sir.

Q. Have you ever been convicted of a crime?

A. Well, I was convicted up here, if you call it a crime, for being drunk and disorderly, on December 10th.

(Testimony of Richard H. Gleason.)

Q. Have you ever been convicted of a court-martial at Fort Seward?

A. That is up to the military authorities—not up to the civilian.

Q. Have you ever had any trouble—

A. I refer you to the Commanding Officer at Fort Seward.

Q. I am asking you?

A. I am not telling nothing that happened in military duty. [14]

Mr. HELLENTHAL.—I submit, your Honor, that he should answer the question.

The COURT.—Answer the question.

A. I was at a summary court—not a court-martial.

Q. You were convicted at a summary court?

A. I was at a summary court.

Q. And they convicted you?

A. I was paroled; yes.

Q. And afterwards paroled?

A. Yes, sir; after they investigated it.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of J. O'Brien, for the Government.

J. O'BRIEN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SHAFNER.)

Q. Mr. O'Brien, you know Mr. Gleason who just testified? A. Yes, sir, I know him.

(Testimony of J. O'Brien.)

Q. Were you with him on December 9th last?

A. Yes, sir; I believe I was with him on that day.

Q. Were you with him at the Alaskan Cafe in the city of Juneau? A. Yes, sir.

Q. That is next door to the Alaskan Hotel?

A. Yes, sir.

Q. Connected with it? A. Yes.

Q. Was any liquor purchased there while you were there?

A. We had some drinks in there—I don't know what you would call them—whether you call them liquor—I couldn't tell you. [15]

Q. What were they? A. I couldn't tell you.

Q. What did you ask for?

A. I asked for a drink, to the best of my knowledge—I think that is what I asked for.

Q. Was the liquor you got intoxicating?

A. There may have been a little kick to it.

Q. Wasn't it intoxicating as a matter of fact, Mr. O'Brien?

A. I couldn't swear it was,—I know I had several drinks in there and I wasn't drunk when I left there.

Q. You were not drunk when you left there?

A. No.

Q. Who served them? A. Mr. Engblad.

Q. What did you ask for when you bought that stuff?

A. Asked for a drink, to the best of my recollection.

(Testimony of J. O'Brien.)

Q. How was it served to you?

A. In small glasses.

Q. About how small?

A. Oh, small whiskey glasses.

Q. How much did you pay for it?

A. Four bits.

Q. A drink? A. Yes.

Q. What condition was Gleason in during this time?

A. Well, I came in there with Mr. Gleason, and we went home,—I went home with him and had dinner, and came back again, and he stayed there quite a while. I wasn't with him but part of this time he was there after supper—I don't know what happened in there during the time I was absent, of course. [16]

Q. Were you there all the time he was there before supper? A. Yes, I believe I was.

Q. What time did you go there?

A. Well, to the best of my opinion it would be around about three o'clock,—probably between 3 and 4.

Q. And you stayed how long?

A. Probably an hour and a half—I didn't pay much attention to the time,—I wouldn't be certain about the time.

Q. Did you see any more of this same kind of liquor served anywheres in that place while you were there that day, to anybody else?

A. Yes, there was others in there.

(Testimony of J. O'Brien.)

Q. They were getting the same sort of stuff, were they? A. Yes.

Q. In these small glasses? A. Yes, sir.

Q. About how many other people do you think you saw there? A. I couldn't say.

Q. As many as ten?

A. No, there wasn't ten; I don't think so.

Q. As many as half a dozen?

A. Yes, probably there might be during all that time.

Q. Yes, that is what I mean, the people there while you were in there. A. Yes.

Q. What was Gleason's condition as to sobriety when he left there with you compared to when you went in there,—was he just as sober when he left as when he went in?

A. I didn't notice much difference in him.

Q. You didn't go back with him after supper?

A. Yes.

Q. How long did you stay after supper? [17]

A. I only stayed a short time with him after supper.

Q. Was he drunk then?

A. No, he wasn't drunk; I wouldn't call him drunk.

Q. Would you say he was partly under the influence of liquor?

A. Well, after we went back after supper, yes; it was noticeable.

Q. It was noticeable then? A. Yes.

Q. From the time you got in there until you went

(Testimony of J. O'Brien.)

back you had been with Gleason all along, hadn't you?

A. From the time I left there to go home—

Q. And you and Gleason came in together in the afternoon? A. Yes.

Q. You were there with him all the time during the afternoon? A. Yes.

Q. And you went to supper with him?

A. No, sir.

Q. Didn't you go to supper with him?

A. Oh, supper—yes.

Q. You stayed with him until you got back there? A. Yes.

Q. Had he had any other intoxicating liquor during all that time—any liquor except what he bought there?

A. He had a bottle with him.

Q. Did you see where he got that?

A. Yes, he got it there.

Q. Where did he get it?

A. He got it at the Alaskan Cafe.

Q. Who sold it to him?

A. Well, I think it was Mr. Engblad.

Q. How much did he pay Engblad for it.

A. I don't know. [18]

Q. Now, from the time you went in the Alaskan Cafe with him until you left him at the Alaskan Cafe in the evening after supper, did he have any intoxicating liquor whatever except what he purchased in glasses or in a bottle at the Alaskan Cafe? A. Not as I know.

(Testimony of J. O'Brien.)

Q. You were with him all the time, weren't you?

A. Yes, until I left him after he came back.

Q. That is what I am talking about,—until you left him after he came back? A. Yes, sir.

Q. He had not had anything to drink while you were with him? A. No.

Mr. SHAFNER.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You don't know what these other half dozen people purchased at all? A. No, I don't.

Q. They may have purchased cigars?

A. Of course if they got some liquor I wouldn't know what it would be.

Q. Some purchased cigars and tobacco, did they not?

A. Yes, I believe there was some purchased cigars.

Q. And it may have been 4 o'clock when you got in there, or it may have been a little after four, Mr. O'Brien?

A. I don't think it was hardly four o'clock.

Q. You had a few drinks before you came in there? A. I did, yes.

Q. About how many did you have? A. Four.

Q. They were moonshine? [19]

A. Possibly might have been, I don't know.

Q. They may have been? A. Yes.

Q. Mr. Miller wasn't in there during any of the time you were in there?

(Testimony of J. O'Brien.)

A. Yes, he was there a while.

Q. Did he sell you any liquor?

A. He didn't sell me any liquor.

Q. Did he sell any liquor to the soldier while you were there? A. Not while I was there.

Q. Not while you were there?

A. No; he may have sold it while I wasn't there, but he didn't sell it while I was in there.

Q. Mr. Miller wasn't even behind the counter while you were there, was he?

A. To the best of my knowledge I don't think he was.

Q. Isn't it a fact he came in for some medicine, came on the other side of the counter and Mr. Engblad handed him over something, and that was the only time—

A. I know Mr. Gleason dressed Mr. Miller's neck. Mr. Miller had a sore neck at the time, and I had occasion to go to the toilet at the time and I don't know what happened in the interim, while I was away.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

GOVERNMENT RESTS.

Mr. HELLENTHAL.—I ask for a nonsuit on the count charging the sale to O'Brien.

Mr. SHAFNER.—Gleason said it was intoxicating. [20]

Mr. HELLENTHAL.—First, because there is no evidence to show that any intoxicating liquor was

sold to O'Brien on the 9th day of December, 1920.

The COURT.—Is your motion for both of the defendants?

Mr. HELLENTHAL—The first motion is Count 4, sale to O'Brien.

The COURT.—I say is your motion on behalf of both defendants?

Mr. HELLENHTAL.—Yes, and on behalf of Mr. Miller separately.

The COURT.—The motion is denied.

DEFENSE.

Testimony of E. L. Barber, for Defendants.

E. L. BARBER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Barber, do you know Mr. Gleason?

A. Yes, sir.

Q. Do you know his reputation for truth and veracity in this community in which he lives?

A. I should say bad.

Q. Do you know his reputation? A. Yes, sir.

Q. What is that reputation—good or bad?

Mr. SMISER.—I would like to test his knowledge a little before he answers that question.

(Questions by Mr. SMISER.)

Q. How long have you been in this community, Mr. Barber?

(Testimony of E. L. Barber.)

A. I have been in this community since last April,—no, May—last May.

Q. Do you associate around generally with people, or does your business confine you pretty closely?

A. No; I associate around pretty much, don't go to dances or anything like that, but I seen pretty much of him at that time. [21]

Q. How long have you known Mr. Gleason?

A. Since last,—let's see—I have known him since he came up here—I don't know exactly when he came up

Q. The latter part of October—the middle or latter part of October.

A. No, no; it was before that,—I think it was last summer some time.

Q. Were you on the same shift with him in the office?

A. Well, most of the time I wasn't. He was on day shift and I was on night shift mostly.

Q. And most of the time you did not associate with him at all, did you?

A. Well, I have been around with him.

Q. What?

A. I knew him in the office—associated with him in the office.

Q. But most of the time you were on night shift and he was on day shift?

A. Yes, sir; most of the time.

Q. Now, about the only association you had with him was when you and he would go out together and get something to drink, wasn't it?

(Testimony of E. L. Barber.)

A. Did that once.

Q. Were you in the habit of getting tight frequently? A. No, sir, I am not.

Q. Recently, haven't you been drunk?

A. No, sir,—what do you mean by recently?

Q. In the last month or two? A. No, sir.

Mr. HELLENTHAL.—I object to that—he should not go any further with the witness—it is not fair to him. [22]

Q. Who did you ever hear discussing Gleason's reputation prior to the time that he swore that he had bought whiskey here from a lot of bootleggers?

A. Well, I heard lots of people around town,—I couldn't mention any names, or anything, because I don't know exactly. I know his reputation around town here just judging from the general talk of the public.

Q. Whom around town have you heard speaking about it?

A. Oh, do I have to answer that?

Q. Yes.

A. I don't care to get others mixed up.

Q. Answer it.

A. I have heard Sergeant Wardell.

Q. He is one of the men in the office there?

A. He is.

Q. Who else?

A. I have heard others but I don't remember who it was.

Q. You don't remember any other men you heard discussing him?

(Testimony of E. L. Barber.)

A. No, sir, I don't remember who it was, but I have heard it.

Q. Did you ever have occasion to discuss Gleason's reputation around town at all until this prosecution of the bootleggers came up? A. Yes, I have.

Q. Well, who? A. Who?

Q. Yes.

A. You asked me if I ever had any occasion—

Q. Yes, who did you have occasion to discuss his reputation with?

A. That comes under military authority,—do I have to answer stuff that comes under that? [23]

Q. That was with the military authorities?

A. Yes, sir.

Q. But you have never heard it discussed by any citizens?

A. I have heard citizens—I cannot remember everything.

Q. They were bootleggers that you have been running with, weren't they?

A. They were bootleggers that I have been running with?

Q. Don't you run with the bootleggers?

A. No, sir; I do not.

Q. Haven't you appeared here for bootlegging?

A. I have appeared for the Government—the subpoena will show that.

Q. Weren't you used by the defendant, as a witness for the defendant, in other liquor cases?

A. Well, let's see now. On the last subpoena it said Government witness.

(Testimony of E. L. Barber.)

Q. I am not talking about the subpoenae—I am talking about your getting on the witness stand and swearing for the defendants.

A. The last time I was here I was asked to go on the stand for the defendant.

Q. For one of those men that was convicted of selling liquor?

A. Well, the lawyer asked me to go on.

Q. I know the lawyer asked you—don't dodge the question. You know that you got on the stand on behalf of the man that was convicted, don't you?

A. I come up here and I answered the questions he asked me—I never had no previous arrangement with him.

Q. On behalf of the man who was convicted of selling liquor?

A. You can call it that if you want to.

Q. What would you call it,—isn't that a fact?

A. I don't know, he asked me to come up here.

[24]

Q. Who?

A. Whoever it was—whoever was the defense.

Q. You knew the men that were running the Kentucky saloon, didn't you?

A. No, sir, I did not.

Q. You know Abatte and Stragier?

A. I know them to speak to them on the street, after I met them on the last trial.

Q. You were in there and got drinks?

Mr. HELLENTHAL.—Your Honor, please; these questions are asked out of order,—he was only to

(Testimony of E. L. Barber.)

ask sufficient questions to find out whether the man's reputation is good or bad.

Mr. SMISER.—I am trying to find out something about him—and how he got his information.

Q. You know these fellows had been running the Old Stand?

A. I didn't know anything about it until after this trial came up.

Q. And after this trial came up you were in there and bought drinks, too, weren't you?

A. No, sir.

Mr. HELLENTHAL.—I object to that.

The COURT.—I think the point is well taken—you cannot cross-examine him now.

Q. Now, the officer that you named that was in the service—the telegraph service, was the only one you ever remember of hearing say anything about Gleason's reputation?

Mr. HELLENTHAL.—I object to that—he didn't so testify. He testified that he heard lots of others.

The COURT.—He may ask him again.

Q. Is he the only one that you remember?

A. That is the only one I remember, yes, sir.

Q. You cannot remember a single other person that you heard say [25] that?

A. I cannot remember their names.

Q. Until Gleason appeared as a witness against these bootleggers you never heard his reputation discussed at all, did you? A. Of course I did.

Q. Whom did you hear discuss it?

(Testimony of E. L. Barber.)

A. I have heard it down around the office.

Q. Before he became a witness against these bootleggers? A. Yes, sir.

Q. You never told anybody that before he was examined as a witness, did you?

A. I never had no cause to tell any one—it wasn't my business.

Q. Never had any cause to tell it? A. No.

Q. You had only known Gleason since late in the summer, hadn't you? A. Yes, I think so.

Q. And you only heard one man speak of his reputation?

A. Oh, I have heard others but I cannot remember who they were.

Q. You remember of having heard only the one?

A. Yes.

Q. These others you heard speak of him, were they connected with the telegraph service or were they citizens of the town?

A. They were citizens of the town.

Q. Were they bootlegging citizens?

A. Not that I know of—I don't know bootlegging citizens—I haven't any reason to associate with them.

Q. You say you don't know bootlegging citizens,—don't you know the proprietor of the Kentucky place?

Mr. HELLENTHAL.—We object to that.

The COURT.—You cannot cross-examine him on things you bring out yourself. [26]

Mr. SMISER.—All right.

(Testimony of E. L. Barber.)

Q. You have been in the old Kentucky, haven't you? A. I have not.

Q. You have been in the New York?

Mr. HELLENTHAL.—I object to that.

The COURT.—After he has finished his direct examination you can cross-examine him, Mr. Smiser, to your heart's content.

Mr. SMISER.—That is all.

(Questions by Mr. HELLENTHAL.)

Q. Mr. Barber, is his reputation good or bad?

A. Well, I should say bad.

Q. Do you know these defendants, Mr. Barber?

A. No, sir, only Mr. Engblad—I know him as an acquaintance to meet on the street and that is all.

Q. That is all? A. Yes, sir.

Q. You testified here as you have testified for anybody that wanted you to tell what you knew?

A. Yes, sir; I was subpoenaed—I had to come.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. SMISER.)

Q. Now, I repeat my question to you. You have been in the habit of patronizing these bootlegging places, have you not? A. No, sir.

Mr. HELLENTHAL.—I object to that as not cross-examination.

The COURT.—Overruled.

Q. Haven't these bootleggers been associates of yours, and friends? A. No, sir. [27]

Q. When they got into trouble didn't they call

(Testimony of E. L. Barber.)

on you because they knew you would come up and testify for them?

A. If they did they did it without my knowledge,—I came up because I was subpoenaed. If I didn't come I would be fined for contempt of court.

Q. Hadn't you talked with them before you were subpoenaed?

A. No, sir, not before I was subpoenaed the first time on that other hearing.

Q. You hadn't talked with them at all?

A. Not that I remember.

Q. How did they know then that you would swear that you would not believe Gleason?

A. I don't know how they knew it,—that isn't any of my business, how they knew it.

Q. They found that out by some secret process as far as you know?

A. Yes, sir; maybe a little bird told them.

Q. Weren't you the little bird that told them?

A. No, sir.

Q. Didn't they give you a drink for testifying?

A. No, sir.

Q. Didn't you go with Gleason on one occasion and get drunk in the Old Stand?

A. Well, I believe that has already been brought out, and I admit that I did.

Q. I want to bring it out now,—you did?

Mr. HELLENTHAL.—I object to that as now cross-examination.

The COURT.—Overruled.

Q. Now, I will ask you if it wasn't in the case

(Testimony of E. L. Barber.)

against the men who were running that Old Stand, where Gleason had testified that he bought liquor from them, that you testified first [28] against Gleason's reputation,—wasn't that the first case?

A. I believe I did.

Q. And yet you had been in there yourself and bought liquor with Gleason and knew that what Gleason swore to was true?

A. Who said I bought liquor?

Q. Didn't you say so?

A. No, sir; I didn't—I said I didn't know what I bought.

Q. Oh, you didn't know what you bought?

A. I did not.

Q. You bought a drink in a little glass?

A. Yes.

Q. You don't know what it was?

A. I don't know what it was.

Q. You paid four bits for it?

A. Well, as I remember, I think it was four bits.

Q. And yet you were willing to swear to the jury that you did not know what it was, and you are willing to swear against Gleason because he swore it was liquor?

A. I am not swearing against Gleason because he swore it was anything—it is none of my business what Gleason swore to.

Mr. SMISER.—That is all.

(Witness excused.) [29]

Testimony of Gerald O. Dwyer, for Defendant.

GERALD O. DWYER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Jerry Dwyer?

A. Gerald O. Dwyer.

Q. Do you know Richard H. Gleason?

A. I do.

Q. Do you know his general reputation in this community for truth and veracity?

A. I know him in a business way.

Q. Do you know his reputation for truth and veracity generally? A. Yes, in a business way.

Mr. SHAFNER.—You know what reputation is—it is what other people say about him.

The WITNESS.—Yes, sir.

Q. (By Mr. HELLENTHAL.) What is the reputation, good or bad?

A. Bad, I would say.

Q. Mr. Dwyer, were you around the Alaskan Hotel on the 9th day of December, 1920?

A. Yes, sir.

Q. Did you notice Richard H. Gleason there, and James O'Brien?

A. I noticed Mr. Gleason—I didn't notice Mr. O'Brien.

Q. What time of day was that?

A. It was between 3:30 and 4 o'clock.

(Testimony of Gerald O. Dwyer.)

Q. Where was Gleason at that time?

A. In the Alaskan Cafe—he was standing in the Alaskan Cafe.

Q. What was his condition at that time as to whether he was drunk or sober?

A. Well, I was looking for a man, and when I came in he called to me— [30]

Mr. SHAFFNER.—Just answer the question.

A. I would say he was drunk.

Q. How drunk was he—describe that to the jury.

A. He called to me and said, “Come here, come here,”—I was busy and I didn’t have any time much to judge him, but I would judge he was pretty drunk, so I didn’t stop at all—I just beat it right along.

Mr. HELLENTHAL.—That is all—you may cross-examine.

Cross-examination.

(By Mr. SHAFFNER.)

Q. What is your occupation?

A. Bookkeeping.

Q. For whom? A. Alaska Daily Empire.

Q. How long were you around at the Alaskan that day?

A. Well when I came in there,—I was only there for probably 5 minutes—just in and out.

Q. Gleason was standing at the bar, wasn’t he?

A. Yes, sir.

Q. Did he have a glass in front of him?

A. I didn’t notice.

(Testimony of Gerald O. Dwyer.)

Q. Was there anybody with him?

A. I didn't even notice that, but he called to me.

Q. And he was pretty drunk?

A. That is the way I would judge from the way he was talking.

Q. Did you see either of these defendants there?

A. I seen one,—I don't remember which one was on shift.

Q. You have seen both of them on shift at various times, haven't you? A. Yes.

Q. Have you seen Mr. Miller behind the bar there? A. Yes. [31]

Q. Frequently? A. Not frequently.

Q. Saw them before December 9th and after, both?

A. Yes; I saw them before December 9th and after.

Mr. SHAFFNER.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Do you remember when Mr. Miller had a boil on his neck? A. Yes, sir.

Q. Do you know whether or not he ever was on shift during that time?

A. Well, I don't know whether he was or not—I don't believe he was—he was sick at that time—he had a couple of boils on his neck.

Q. Do you know whether that was about the first of December or not?

A. It was about the 1st of December.

Mr. HELLENTHAL.—That is all.

(Testimony of Gerald O. Dwyer.)

Recross-examination.

(By Mr. SHAFFNER.)

Q. How often do you go in there?

A. Well, I room there—I go in pretty often.

Q. You room upstairs?

A. Yes, sir, some of the time—not all of the time—part of the time.

Q. You know both of these defendants pretty well?

A. Yes, sir; have a speaking acquaintance,—yes, I know them pretty well.

Mr. SHAFFNER.—That is all.

(Witness excused.)

Testimony of James McCloskey, for Defendants.

JAMES McCLOSKEY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: [32]

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is James McCloskey? A. Yes.

Q. Do you know Richard H. Gleason?

A. Yes, sir.

Q. Did you see Mr. Gleason at any time on December 9th last? A. I did.

Q. About what time did you see him on that day?

A. It was about 4 o'clock in the afternoon.

Q. Where did you see him?

A. In the hotel lobby.

Q. Did you observe his condition at that time,

(Testimony of James McCloskey.)

whether he was drunk or sober? A. I did.

Q. What was his condition?

A. He was, I would judge, intoxicated.

Q. How intoxicated was he?

A. Well, I didn't stay very long with him—he says, "Come on and have a drink," and I went and took a cigar and I beat it.

Q. You had a cigar with him at that time?

A. Yes, sir.

Q. Did you see him again during that day?

A. No.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. SHAFNER.)

Q. Where did he take you when he said "Come and have a drink"?

A. Took me into the cafe.

Q. That is the place that Miller runs? A. Yes.

Mr. SHAFNER.—That is all. [33]

Q. (By Mr. HELLENTHAL.) Was there any intoxicating liquor served to Mr. Gleason while you were with him?

A. I didn't stay very long—I don't know whether there was or not.

Q. (By Mr. HELLENTHAL.) Did he drink any?

A. I don't know what he took.

Q. (By Mr. HELLENTHAL.) Don't know what he took? A. No.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony of Charles Miller, in His Own Behalf.

CHARLES MILLER, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. What is your name? A. Eluy Millich.

Q. They frequently call you Charles Miller?

A. Yes, that is my name.

Q. How do they happen to call you Charles Miller?

A. Millich is hard to say, and they call me Miller.

Q. What is your nationality?

A. Montenegrin.

Q. How long have you been in Juneau?

A. About 5 years—four or five years.

Q. You have heard the testimony here of Mr. Gleason? A. Yes, sir.

Q. Did you sell Mr. Gleason anything of any kind on December 9th? A. No, sir.

Q. On that day you remember seeing Mr. Gleason in your place of business? [34]

A. I don't remember—I saw a soldier, I remember, but I don't remember whether it was him or somebody else.

Q. You remember seeing a soldier there?

A. I got up around 4 o'clock, and I went to the garage to take the car out, and I didn't stay two minutes.

(Testimony of Charles Miller.)

Q. Did you serve anybody any intoxicating liquor— A. No, sir.

Q. Or anything else, behind the counter?

A. No, sir, I did not.

Q. Did you go behind the counter that day?

A. No, sir, I didn't work that day at all.

Q. Did you go into the place at all?

A. Yes, sir, some times I go into the place.

Q. When did you go into the place?

A. I got up about 4 o'clock, and I go down to the garage to get the car out—I had boils on my neck, so I went down to the car.

Q. That is your place there? A. Yes, sir.

Q. Do you keep any intoxicating liquor there?

A. No, sir.

Q. Keep any for sale? A. No, sir.

Q. Is there any kept there with your knowledge?

A. Not that I know.

Q. Either that day or any other day?

A. Not that I know.

Q. You say you did see a soldier in there that day? A. I did see a soldier; yes, sir.

Q. Did you see Mr. O'Brien there at that time?

A. I don't remember—I didn't know him. [35]

Mr. HELLENTHAL.—That is all—you may cross-examine.

Cross-examination.

(By Mr. SHAFFNER.)

Q. I understand you are the proprietor of this place? A. Yes, sir.

(Testimony of Charles Miller.)

Q. Named the Alaskan Cafe. How long have you been proprietor of that?

A. I don't remember exactly—four or five months.

Q. And still are? A. Yes, sir.

Q. Mr. Engblad, what does he do?

A. Work for me.

Q. How long has he worked for you?

A. Worked for me since a month after I opened up the place.

Q. Did he work for you before December 9th?

A. Yes, sir.

Q. And he works for you now? A. Yes, sir.

Q. And ordinarily, except, for instance, this time you had boils, you work behind the bar sometimes yourself?

A. Ten or fifteen days after I opened up the place I worked there, that is all.

Mr. SHAFFNER.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. You say you have worked 10 or 15 days since you have had the place? A. Yes.

Q. You seldom go behind the counter at all?

A. No. [36]

Q. And you have run that place for four or five months?

A. I don't remember—four, five or six months.

Q. What do you sell there?

A. Soft drinks, cigars and tobacco, and a lunch counter and restaurant.

(Testimony of Charles Miller.)

Q. Was there a lunch counter and restaurant in there on the 9th day of December? A. Yes, sir.

Q. Who was running that at that time?

A. A fellow—I don't know his last name—Dick. Mr. HELLENTHAL.—That is all.

Q. (By Mr. SHAFFNER.) Do you remember the preliminary examination in this case before the Commissioner? You were there, weren't you?

A. Yes, sir.

Q. (By Mr. SHAFFNER.) You heard Gleason testify there? A. Yes, sir.

Q. (By Mr. SHAFFNER.) And you heard O'Brien testify there, and you heard them both testify that Mr. Engblad had sold them some drinks?

Mr. HELLENTHAL.—I object to that.

The COURT.—Objection sustained.

Mr. SHAFFNER.—That is all.

(Witness is excused.)

Testimony of A. J. Millingson, for Defendant.

A. J. MILLINGSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is A. J. Millingson?

A. Yes, sir.

Q. You are employed at the cable office? [37]

A. Yes, sir.

Q. Do you know Richard H. Gleason?

A. Yes, sir.

(Testimony of A. J. Millingson.)

Q. Do you know his general reputation for truth and veracity in this community?

A. Well, the general opinion of the boys down there that know it.

Mr. SMISER.—I object to any testimony at the cable office.

The COURT.—General reputation means what the people generally that he associates with, what they say.

A. Those that I have heard speak about him—

The COURT.—Do you know what they generally say about him? A. Yes, sir.

Q. (By Mr. HELLENTHAL.) What is that reputation—good or bad? A. It is not good.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. SMISER.)

Q. You never did hear this man's reputation discussed at all until he appeared as a witness in these bootlegging cases here? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Who did you hear discuss it?

A. Well, I cannot think of his name—he is over at Sitka—he seemed to know Mr. Gleason and told about his reputation.

Q. He was in the cable office?

A. He is in the cable office there, yes, sir—is now.

Q. You heard him discussing Gleason?

A. Over the wire—not verbally, but over the wire. [38]

(Testimony of A. J. Millingson.)

Q. Who else did you hear discuss it?

A. Do I have to tell?

Q. Yes.

Mr. HELLENTHAL.—If you remember.

A. I would rather not speak of some of them.

Q. What did you say?

A. I would rather not, if I can help it.

Q. Were they in the cable office? A. Yes, sir.

Q. How many of them did you hear discuss it?

A. Well, quite a few of them, and even one from Haines, Lieutenant —, and Mr. Cohoe, an attorney, also from Haines.

Q. Did you ever hear anybody else except these officers that you speak of that are in the cable office?

A. Well, I heard Mr. Bartlett—he said that he wouldn't believe him—from the Gastineau.

Q. Who is that? A. Mr. Bartlett.

Q. Mr. Bartlett from the Alaskan Hotel?

A. From the Gastineau Hotel.

Q. Anybody else?

A. Yes, quite a number that I don't know their names.

Q. Now, as a matter of fact Gleason was drinking a good deal about the time of the original arrests, wasn't he?

A. Well, I don't know—I cannot always tell whether a person is or not.

Q. You were drinking some, too, about that time, weren't you?

A. I brought some whiskey down with me when I left Haines—yes, sir, I did.

(Testimony of A. J. Millingson.)

Q. And on several occasions you were pretty full?

A. Only that one time that I know of. [39]

Q. You appeared here as a witness the other day in a case—in a similar case?

A. Yes, sir; I said I didn't buy here, but I did bring it down with me, yes, sir—since you are asking me I will tell you.

Q. You were pretty full that evening, weren't you?

A. I think I must have been because I didn't work that day.

Q. You were too full to work?

A. I think I was; yes, sir.

Q. Now, as a matter of fact, wasn't it the custom of yourself and Gleason and nearly all of the boys down there to go into these bootlegging places.

A. No, sir.

Q. And drink? A. No, sir—not with me.

Q. Don't you go in there frequently?

A. No, sir.

Q. In the Old Kentucky?

A. Not to drink anything. I have stopped in there and got my tobacco—I smoke all the time.

Q. The Mecca? A. No, sir.

Q. The Old Stand? A. No, sir.

Q. You have been drunk three nights this last week, haven't you? A. I have been?

Q. Yes.

A. Well, I don't know—I don't think so. I have been working right along except Saturday, when I

(Testimony of A. J. Millingson.)

got my inoculation and the doctor ordered me not to work.

Q. Off duty hours, when you were off duty, you were drunk? [40]

A. No, sir. Ask Dr. Sloane if I was. I took my inoculation Saturday and he ordered me not to work, and I didn't—I went to my room.

Mr. SMISER.—That is all.

(Witness excused.)

Testimony of Dick Roberts, for Defendants.

DICK ROBERTS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Roberts, do you know the witness Gleason? A. I know him by sight.

Q. Did you see anything of him on the 9th day of December last past? A. I did.

Q. Where were you at the time that you saw him?

A. Alaskan Cafe.

Q. Were you there when he first came in?

A. Yes, sir.

Q. At what time was that?

A. About 4 o'clock in the afternoon.

Q. Did you observe his condition then as to whether he was drunk or sober? A. I did.

Q. What was he—drunk or sober? A. Drunk.

Q. Did you observe Mr. Miller come in there at any of the time you were there?

(Testimony of Dick Roberts.)

A. Not just then he didn't.

Q. How long did you stay there after Gleason came in? A. About 5 minutes—3 or 4 minutes.

[41]

Q. What business was conducted in that place at that time?

A. Soft drinks, cigars and tobacco, and a restaurant.

Mr. HELLENTHAL.—That is all—you may cross-examine.

Cross-examination.

(By Mr. SHAFFNER.)

Q. What is your business, Mr. Roberts?

A. I am a cook.

Q. Where? A. At the Alaska Grill.

Q. Just what is it that recalls December 9th to your mind?

A. It was just a few days after I came over from Sitka, and I know Mr. ——— and I went in there to talk to him about opening up the restaurant there, and I happened to be there on December 9th when the soldier came in there.

Q. There wasn't anything about a soldier coming in there that marked it on your mind?

A. It looked kind of funny to see a soldier drunk, yes.

Q. What time did you come here?

A. On the 5th.

Q. Where do you live here? A. On 4th Street.

Q. How long were you in that place altogether that day?

(Testimony of Dick Roberts.)

A. At that time the soldier came in I was there about 10 minutes, then I went in and opened up the restaurant that night.

Q. You began to work in there?

A. Yes; I started to work in the restaurant that same evening.

Q. How long did you stay working for them?

A. About one month. [42]

Mr. SHAFFNER.—That is all.

(Witness excused.)

Testimony of John Engblad, in His Own Behalf.

JOHN ENGBLAD, one of the defendants called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Engblad, you have heard the testimony in this case? A. Yes, sir.

Q. Heard the testimony of Gleason?

A. Yes, sir.

Q. You were working for Charley Miller on the 9th day of December? A. Yes, sir.

Q. Did you, during the 9th day of December, sell any intoxicating liquor to Mr. Gleason?

A. No, sir.

Q. At any time during that day? A. No, sir.

Q. Did you ever sell him any intoxicating liquor?

A. No, sir.

(Testimony of John Engblad.)

Q. Did you sell Mr. O'Brien any intoxicating liquor that day? A. No, sir.

Q. Did you ever sell Mr. O'Brien any intoxicating liquor? A. No, sir.

Q. Did you sell Mr. Gleason a bottle on that day of any kind or description? A. No kind of bottle.

Q. You were working there for Mr. Miller? [43]

A. Yes, sir.

Q. Where were you when Mr. Gleason first came in there?

A. I was sitting down there in a big chair just inside of the partition—a chair something like this—talking to Mr. Roberts.

Q. That is the man who just testified?

A. Yes, sir.

Q. What was Mr. Gleason's condition at that time? A. He appeared to be drunk.

Q. How long did Mr. Gleason stay there?

A. Well, I cannot say positively because there was fellows coming in and going out and I would be talking to different ones—didn't pay much attention to him all the time—he was talking to everybody that came in.

Q. About how long would you say?

A. Possibly an hour.

Q. Did you have any intoxicating liquor in the place of business on that day? A. No, sir.

Mr. HELLENTHAL.—You may cross-examine the witness.

(Testimony of John Engblad.)

Cross-examination.

(By Mr. SHAFFNER.)

Q. You say he was there about an hour in the afternoon?

A. Well, I think it was about an hour—might have been a little less or a little more.

Q. He was drunk?

A. Yes, sir—he appeared to be.

Q. Drunk when he came in?

A. Yes, sir—staggered.

Q. You noticed it right away? [44]

A. Mr. Roberts made the remark to me, he said, “That fellow has got a jag on.”

Q. Right after that you noticed it?

A. Sure; he jumped up against the wall—up against the counter.

Q. Then he came back in the evening again, did he? A. I wasn't there in the evening.

Q. You were not there in the evening?

A. No, sir.

Q. Who was on duty in the evening?

A. Mr. Baker.

Mr. SHAFFNER.—That is all.

(Witness excused.)

Testimony of Walter Johnson, for Defendants.

WALTER JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Walter Johnson?

A. Yes, sir.

Q. Do you know Richard H. Gleason?

A. Yes, sir.

Q. Did you know him in Haines? A. Yes, sir.

Q. And you knew him in Juneau? A. Yes, sir.

Q. Do you know his general reputation in this community for truth and veracity? A. I do.

Q. What is that reputation—good or bad? [45]

A. It is bad—very bad.

Mr. HELLENTHAL.—You may cross-examine the witness.

Mr. SCHAFNER.—No questions.

(Witness excused.)

**Testimony of Charles Miller, in His Own Behalf
(Recalled).**

CHARLES MILLER, recalled as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Who was your night man on December 9th?

A. Baker.

Q. Where is Baker now? A. I don't know.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

DEFENDANTS REST.

Whereupon the defendants moved that the Court instruct the jury to return a verdict in favor of the defendants on Count Three of the indictment for the reason that the law has been repealed on which said Count was based, and further moved the Court that the plaintiff be required to elect between Counts Two and Count Five of the indictment. Whereafter the Court denied the defendants' request for an instructed verdict as to Count Three, to which ruling the defendants excepted and an exception was allowed and the Court instructed the jury to find the defendants not guilty as to Count Five.

The jury was charged and retired and

Thereafter the jury returned a verdict finding the defendants not guilty as to Counts Two and Four and guilty as to Counts One and Three; to which verdict the defendants did then and there object for the reasons: That the verdict of guilty on Counts One and Three was not supported by any evidence and was against the law; which said verdict is in words and figures as follows, to wit:
[46]

“In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1452-B.

UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* CHARLES MILLER, and
JOHN ENGBLAD.

Verdict.

We, the jury empanelled and sworn in the above-entitled cause, do find as follows:

As to the defendant Eluy Millich, *alias* Charles Miller: We find him guilty as charged in the indictment. We find him guilty on Counts Nos. 1 and 3 and not guilty on Counts Nos. 2 and 4 of the indictment.

As to the defendant John Engblad: We find him guilty as charged in the indictment. We find him guilty on Counts Nos. 1 and 3, and not guilty on Counts Nos. 2 and 4 of the indictment.

A. J. SPRAGUE,

Foreman.”

whereupon and within the time provided by law, the defendants filed the following motions for judgment notwithstanding the verdict and a motion for a new trial, which said motions are in words and figures as follows, to wit:

“In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1452-B.

UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* ‘CHARLES MILLER,’
and JOHN ENGBLAD.

**Motion in Arrest of Judgment Notwithstanding the
Verdict.**

Come now the defendants and respectively move
the Court that the defendants have judgment on
the verdict of guilty on Count Four of the Indict-
ment herein; for the reason that the allegations set
forth in said count and the [47] facts stated
do not constitute a crime.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendants.

Copy received and service admitted.

JAMES A. SMISER,
District Attorney.”

“In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1452-B.

UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* ‘CHARLES MILLER,’
and JOHN ENGBLAD.

**Motion for Judgment Notwithstanding the
Verdict.**

Come now the defendants and move for judgment of not guilty upon the verdict of the jury, returned in the above-entitled cause, on Counts one and three of the indictment herein, for the reason: That the defendants were found not guilty on Counts Two and Four of the indictment herein; that the only evidence, if any, that would sustain conviction on Counts One and Three was the evidence of sales set forth in Counts Two and Four.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants.

Copy received and service admitted.

J. A. SMISER,
District Attorney."

"In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

THE UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* 'CHARLES MILLER,'
and JOHN ENGBLAD.

Motion for New Trial.

Come now the defendants and move for new [48]
trial on Counts One and Three of the indictment
herein, upon the following grounds:

Insufficiency of evidence to justify the verdict

against the defendants, or either one of them, on Counts One and Three of the indictment herein.

Errors of law occurring at the trial and excepted to by the defense; and particularly error in overruling of the demurrer to Count Four of the indictment herein; in refusing to grant defendant's motion that no evidence be received in the above-entitled case, until the plaintiff elect between Count Three and the remainder, for the reason that a felony and misdemeanor had been improperly united in the indictment.

Irregularity of the jury in finding the defendants guilty on Counts One and Three, while they had found them not guilty on Counts Two and Four; since the only evidence offered as to the guilt of the defendants on Counts One and Three was the sales of liquor made, as alleged in Counts Two and Four, of which the defendants were found not guilty.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants.

Copy received and service admitted.

JAMES A. SMISER." [49]

All of which said motions were overruled by the Court, to which ruling and to the ruling on each motion the defendants then and there excepted, and an exception was allowed them to the ruling on each of said motions by the Court.

In the District Court for the District of Alaska.
Division Number One.

Case No. 1452-B.

UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* "CHARLES MILLER,"
and JOHN ENGBLAD.

Order: Allowing and Settling Bill of Exceptions.

I, Thomas M. Reed, Judge of the above-entitled court, successor to Robert W. Jennings who presided at the trial of the above-entitled cause, DO CERTIFY that on the 12th day of Dec. 1921, within the time allowed by this Court, the defendants present to this Court, after due notice having been served upon the United States Attorney for the District of Alaska, Division Number One, this their bill of exceptions herein and pray that the same be allowed, filed and made a part of the record in this case; and I having examined the same and being fully advised in the premises do allow and settle the same as a true and correct bill of exceptions; and I do FURTHER CERTIFY that the same contains all the evidence heard at the trial, and do order the same to be made a part of the record herein.

THOS. M. REED.

J. D. C.

Dated this 12th of Dec., 1921.

Filed in the District Court, District of Alaska,
First Division. Dec. 12, 1921. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [50]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1452-B.

THE UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
Defendant.

Judgment and Sentence.

The above-entitled cause comes duly on at this time for the imposition of sentence upon the above-named defendant, Charles Miller, on the verdict of the jury heretofore, to wit, on March 22, 1921, rendered herein, which said verdict found the defendant guilty as to Counts 1 and 3 as charged in the indictment, for the violation of Alaska Bone Dry Law (illegal possession of intoxicating liquor), and sec. 3242, R. S. Defendant is present in court and is represented by his attorney, S. Hellenthal, Esquire. James A. Smiser is present on behalf of the plaintiff. Thereupon the defendant is asked if he has any reason to offer why sentence should not now be imposed upon him, to which he does not offer any sufficient or valid reason.

It is, therefore, the JUDGMENT of the Court that said defendant, Charles Miller, is guilty of the violation of Alaska Bone Dry Law (illegal possession of intoxicating liquor), and sec. 3242, R. S., and it is the Sentence of the Court that said defendant, Charles Miller, be fined \$800.00 and con-

fined in the United States Federal Jail, at Juneau, Alaska, for a period of three (3) months. Stay of execution on presentation of bond in the sum of \$2000.00; for sixty (60) days, and that he stand committed until said sentence is fully executed.

Done in open court this 11th day of May, A. D. 1921.

ROBERT W. JENNINGS,
District Judge.

Entered Court Journal No. 1, Page 68.

Filed in the District Court, District of Alaska, First Division. May 11, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy. [51]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ELUY MILLICH, *alias* "CHARLES MILLER,"
and JOHN ENGBLAD,
Defendants.

Petition for Writ of Error.

To the Honorable ROBERT W. JENNINGS,
Judge of the Above-entitled Court:

The above-named defendants feeling themselves aggrieved by the verdict of the jury rendered herein

and the judgments and sentences thereon rendered on May 11, 1921, whereby the defendant Eluy Millich was adjudged guilty of the crimes charged in Counts One and Three of the indictment and sentenced to serve a term of three months in the Federal Jail at Juneau, Alaska, and pay a fine of Eight Hundred Dollars (\$800.00), and whereby the defendant, John Engblad, was adjudged guilty of the crimes charged in Counts One and Three of the indictment herein and sentenced to serve a term of three months in the Federal Jail at Juneau, Alaska:

COME NOW the said defendants and petition this Honorable Court for an order allowing said defendants to prosecute a writ of error in and to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the law in such cases made and provided; also that an order be made staying proceedings and execution in such case until a further order of the Court of Appeals and pending the prosecution of said writ of error.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants.

Due service of a copy of the foregoing and within petition for writ of error is admitted this 12th day of July, 1921.

WALTER SCHAFFNER,

Asst. United States District Attorney.

The foregoing writ of error allowed and the amount of the supersedeas bond continued as previously fixed,—\$1,000 for John Engblad [52] and \$2,000 for Eluy Millich.

Dated this 13th day of July, 1921.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. 4, page 374, at Ketchikan.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ———, Deputy. [53]

O. K. as to form.

JAMES A. SMISER,

U. S. Atty.

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

UNITED STATES OF AMERICA

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
and JOHN ENGBLAD.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Eluy Millich, one of the above-named defendants, as principal, and James McCloskey and John Newman, as sureties, are held and firmly bound unto the United States of America in the penal sum of Two Thousand Dollars (\$2,000.00), for which payment well and truly to be made we bind ourselves and each of us, our heirs, and each of

our heirs, executors and administrators firmly by these presents.

THE CONDITION of the above obligation is such that whereas the above-named principal and defendant, Eluy Millich, is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled case rendered by the District Court of the District or Territory of Alaska, Division Number One, and entered and made on May 11th, 1921, whereby and by the terms of which the said Eluy Millich was sentenced to serve three months in the Federal Jail at Juneau, Alaska, and pay a fine in addition thereto of \$800 for the crimes mentioned in said judgment and sentence;

NOW, THEREFORE, the conditions of this obligation are such that the said defendant Eluy Millich shall prosecute said writ of error to effect and answer all [54] costs and damages if he shall fail to make good his plea and shall at all times render himself amenable to the orders and processes of this court or the Appellate Court, and render himself in execution if the judgment of this court is affirmed or any judgment of this court in said proceedings or said Appellate Court, or any court, then this obligation

thirty days from the date of this writ, pursuant to a writ of error filed in the District Court for the District and Territory of Alaska, Division Number 1, at Juneau, Alaska, wherein Eluy Millich (*alias* "Charles Miller") and John Engblad are plaintiffs in error and the United States is defendant in error, then and there to show cause, if any there be, why the said judgment in said case and in said writ of error mentioned should not be corrected and speedy justice should not be done in their behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 13th day of July, 1921.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By———, Deputy.

Copy of the foregoing citation in error received, and service admitted this 12th day of July, 1921.

WALTER SCHAFFNER,

Asst. United States District Attorney. [57]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELUY MILLICH, *alias* "CHARLES MILLER,"
and JOHN ENGBLAD,

Defendants.

Writ of Error.

The President of the United States to the Honorable ROBERT W. JENNINGS, Judge of the District Court, District of Alaska, Division Number One, at Juneau, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in said District Court, before you between the United States of America and Eluy Millich (*alias* "Charles Miller") and John Engblad, manifest error hath happened to the great prejudice and damage of the defendants Eluy Millich and John Engblad as is stated and appears in the petition herein.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice be done to the parties in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly you send the record and the proceedings aforesaid with all things concerning the same to the United States

Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, together with this writ, so that you [58] have the same before said Court on or before thirty days from the date hereof; that the record and proceedings aforesaid being inspected the Circuit Court of Appeals may cause further to be done therein to correct those errors what of rights and according to the laws and customs of the United States ought to be done or should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Ketchikan, this 13th day of July, 1921.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy.

Allowed:

ROBERT W. JENNINGS,
Judge.

A copy of the foregoing and within writ of error received this 13th day of July, 1921, and service thereof admitted.

WALTER SCHAFFNER,
Asst. United States Attorney, First Judicial Division, Alaska.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk.
By _____, Deputy. [59]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELUY MILLICH, *alias* "CHARLES MILLER,"
and JOHN ENGBLAD,

Defendants.

Assignment of Errors.

COME NOW the above-named defendants and file the following assignment of errors upon which they will rely in their prosecution of the writ of errors in the above-entitled cause from the judgments and proceedings had by this Honorable Court, which said judgments were signed and entered herein in the above-entitled court on the 11th day of May, 1921.

I.

That the District Court for the District of Alaska erred in overruling the demurrer interposed by the defendants and appellants to the indictment and to each and every count thereof, and particularly the demurrer interposed to Count Three of the indictment herein, which said indictment and demurrer are fully set forth in the record herein and are made a part of this assignment of errors.

II.

That the Court erred in refusing to direct a verdict in favor of the defendants *are* the close of the testimony on Count 3 of the indictment.

III.

That the Court erred in overruling plaintiff's motion for a judgment notwithstanding the verdict.

IV.

That the Court erred in overruling plaintiff's motion for a new trial.

V.

That the Court erred in entering judgment against the defendant Eluy Millich. [60]

VI.

That the Court erred in entering judgment against the defendant John Engblad.

And for said errors and other manifest errors of record, the defendants pray that the judgments be reversed and the cause remanded.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants.

Copy of the foregoing and within assignment of errors received this 13th day of July, 1921, and service thereof admitted.

WALTER SCHAFFNER,

Asst. United States District Attorney.

Filed in the District Court, District of Alaska,
First Division. July 13, 1921. J. W. Bell, Clerk.
By —————, Deputy. [61]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Order No. 1452-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
and JOHN ENGBLAD,

Defendants.

**Order Extending Time Sixty Days to Complete and
File Record on Appeal (Dated July 15, 1921).**

On motion of Hellenthal & Hellenthal, attorneys
for the above-named defendants, made in open court,
and it appearing to the Court that the bill of excep-
tions in the above-entitled cause cannot be settled
and the transcript on appeal in said cause cannot
be made out in time to reach the Circuit Court
of Appeals for the Ninth Circuit at San Francisco
within thirty days from the date of the citation
herein,—

IT IS ORDERED that sixty days additional is
hereby granted in order to forward the record
on appeal to the Circuit Court of Appeals for the
Ninth Circuit.

Done in open court this 15th day of July, 1921.

ROBERT W. JENNINGS,

Judge.

O. K.—WALTER SCHAFFNER,

Asst. U. S. Atty.

Filed in the District Court, District of Alaska, First Division. July 15, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy.

Entered Court Journal No. 4, page 375, at Ketchikan. [62]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
and JOHN ENGBLAD,

Defendants.

**Order Extending Time Ninety Days to Complete
and File Record on Appeal (Dated September
7, 1921).**

On motion of Hellenthal & Hellenthal, attorneys for the above-named defendants, made in open court, and it appearing to the Court that the bill of exceptions to the above-entitled cause cannot reasonably be settled and the transcript on appeal in said cause cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit within the time in which it was extended in July,—

IT IS ORDERED that ninety days' additional time from the date hereof is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 7th day of September, 1921.

ROBERT W. JENNINGS,
Judge.

O. K.—A. G. SHOUP,
U. S. Atty.

Filed in the District Court, District of Alaska,
First Division. Sept. 7, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy.

Entered Court Journal No. 1, page 79. [63]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
and JOHN ENGBLAD,

Defendants.

**Order Extending Time Forty Days to Complete
and File Record on Appeal (Dated November
22, 1921).**

On motion of Hellenthal & Hellenthal, attorneys
for the defendant above-named, made in open court,
and it appearing to the Court that the bill of excep-
tions in the above-entitled cause cannot be settled
and the transcript on appeal in this case cannot
be made out in time to reach the Circuit Court

of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted.—

IT IS ORDERED that forty days' additional time from the date hereof is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 22d day of November, 1921.

THOS. M. REED,
Judge.

O. K.—A. G. SHOUP,
U. S. Atty.

Filed in the District Court, District of Alaska, First Division. Nov. 22, 1921. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. 1, page 145. [64]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
and JOHN ENGBLAD,
Defendants.

Order Extending Time to and Including January 10, 1922, to Complete and File Record on Appeal (Dated December 16, 1921.)

On motion of Hellenthal & Hellenthal, attorneys for the defendant above-named, made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted,—

IT IS ORDERED that an extension of time to and including January 10, 1922, is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 16th day of December, 1921.

THOS. M. REED,
Judge.

O. K.—A. G. SHOUP,
U. S. Atty.

Filed in the District Court, District of Alaska,
First Division. Dec. 16. John H. Dunn, Clerk.
By L. E. Spray, Deputy. [65]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 1452-B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ELUY MILLICH, *alias* CHARLES MILLER,
and JOHN ENGBLAD,
Defendants.

Praeceptum for Transcript of Record.

Kindly prepare certified copies for transmission to the Circuit Court of Appeals in connection with your return on the writ of error herein as follows:

1. Indictment.
2. Plea to the indictment.
3. Bill of exceptions.
4. Judgment against Charles Miller, dated May, 11, 1921.
5. Petition for writ of error.
6. Order allowing writ of error and fixing amount of supersedeas bond.
7. Supersedeas bond.
8. Citation.
9. Writ of error.
10. Assignments of error.
11. All orders extending time for the settlement of bill of exceptions or extending time for the return on the citation.

HELLENHAL & HELLENTHAL,
Attorneys for Defendants.

Filed in the District Court, District of Alaska,
First Division. Dec. 13, 1921. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [66]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 66 pages of typewritten matter, numbered from one to 66, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for plaintiff in error on file in my office and made a part hereof, in Cause No. 1452-B, wherein Eluy Millich, *alias* "Charles Miller," and John Engblad are defendants and plaintiffs in error and The United States of America is plaintiff and defendant in error.

I further certify that the said record is by virtue of a writ of error and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to

the sum of thirty dollars (\$30.00) has been paid to me by counsel for plaintiffs in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 16th day of December, 1921.

[Seal]

JOHN H. DUNN,
Clerk.

By _____,
Deputy. [67]

[Endorsed]: No. 3814. United States Circuit Court of Appeals for the Ninth Circuit, Eluy Millich, *alias* "Charles Miller," and John Engblad, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1. Filed December 27, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3814

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELUY MILLICH, alias CHARLES MILLER,
and JOHN ENGBLAD,
Plaintiffs in Error.

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

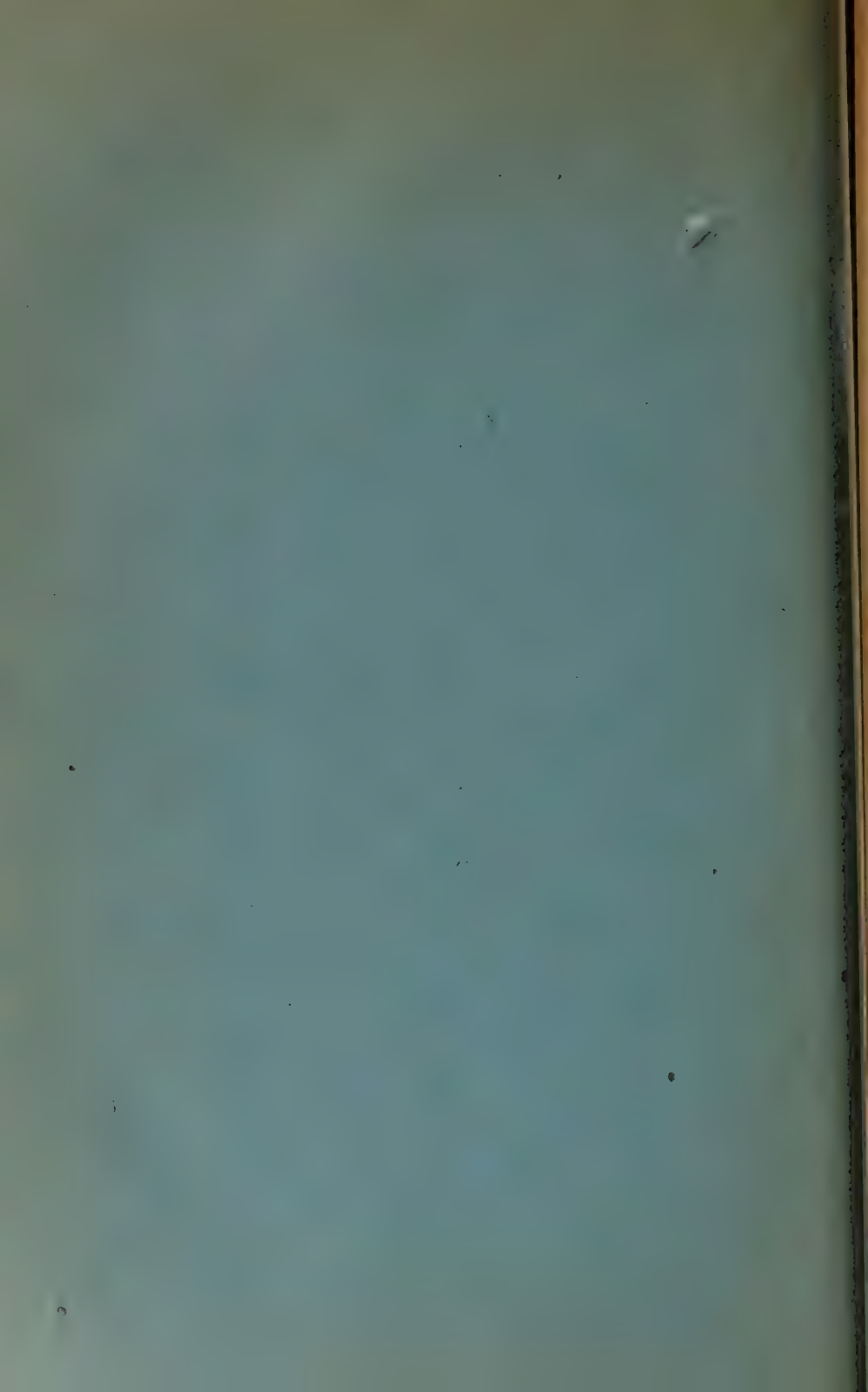
ARTHUR G. SHOUP,

*United States Attorney, First Division,
District of Alaska, for Defendant in
Error.*

FILED

FEB 11 1902

F. D. WASHINGTON



No. 3814

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELUY MILLICH, alias CHARLES MILLER,
and JOHN ENGBLAD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT.

The evidence in this case is that two young men, Richard H. Gleason and J. O'Brien (Gleason being a United States soldier in uniform) on the 9th day of December, 1920, entered an establishment known as the Alaskan Cafe in the town of Juneau, Alaska. While there, Gleason and O'Brien purchased several drinks of intoxicating liquor; supposed to be whiskey, and which Gleason testified was whiskey, to his belief and knowledge, and which he swore was intoxicating (Tr. p. 11). Gleason also testified that said intoxicating liquor was kept by defendants behind the bar in said establishment (Tr. p. 12).

For such intoxicating liquor they paid fifty cents a drink, served in small whiskey glasses (Tr. p. 18).

Gleason testified that he also purchased a small bottle containing about one-half pint of said whiskey, for which he paid \$3.50 (Tr. pp. 12 and 13). Gerald O. Dwyer, a witness for the defense, testified (Tr. pp. 34 and 35) that at said time he saw the witness Gleason in said Alaskan Cafe, leaning against the bar in an intoxicated condition.

James McCloskey, proprietor of the Alaskan Hotel, another witness for the defense, testified (Tr. pp. 36 and 37) that Gleason invited him to go from the hotel lobby to the room conducted by the defendants and have a drink. McCloskey testified that Gleason was intoxicated. McCloskey says he took a cigar but he did not know what Gleason took.

ARGUMENT.

Counsel for plaintiffs in error divides the errors assigned by them into two heads as follows:

First—Was it error to overrule the demurrer of the defendants' to Count Three of the indictment charging a crime under the revenue act and to overrule the defendants' motion for a directed verdict, and their motions for judgment notwithstanding the verdict on said Count?

Second—Was the evidence as to Count One of the indictment herein sufficient or was the verdict on

Count One repugnant or inconsistent with the verdict on Counts Two and Four?

Counsel insists that Sec. 3242 U. S. R. S. was repealed by the Volstead Act. Disregarding other citations of counsel for plaintiff in error, I submit that this proposition was settled by the Supreme Court in the case of *U. S. v. Yuginovich et al*, 254 U. S. . . . , 41 S. Ct. 551, 65 L. Ed. . . . (decided June 1, 1921). That decision held that the Volstead Act repealed provisions of the Internal Revenue Law, such as Section 3242 R. S., only to the extent of the inconsistencies and reduced the penalties imposed by the Internal Revenue Law to the penalties fixed by the Volstead Act. Section 29 of the Volstead Act provides as follows:

“Sec. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than \$200 nor more than \$2,000 and be imprisoned not less than one month nor more than five years.

“Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than \$500; for a second offense not less than \$100 nor more than \$1,000, or be imprisoned not more than

ninety days; for any subsequent offense he shall be fined not less than \$500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officers to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

Section 3242 R. S. provides:

"Every person who carries on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills, without having paid the special tax as required by law, shall, for every offense, be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years."

In the case at bar, the defendants were each fined in the sum of \$800, and sentenced to be confined in the United States Federal Jail at Juneau, Alaska, for a period of three months as to each of the counts of the indictment upon which they were found guilty. It may therefore be that the penalty as to Count Three of the indictment should be reduced to the extent of remitting the jail sentence as there

is no provision for the imposition of a fine and jail sentence both for a first offense under the Volstead Act.

“The appellate court in affirming a conviction may modify the punishment imposed by the trial court by mitigating, reducing, or otherwise changing it so far as it exceeds the limits prescribed by the statute. This rule applies to a fine or a sentence to a term of imprisonment in excess of that permitted by a statute; to a fine rendered against defendants jointly; to a sentence on a general verdict of guilty where one of several counts is unsustainable by any evidence; and to a premature sentence.” (12 Cyc., 938.)

Jackson v. U. S., 102 Fed. 239.

Defendant in error further contends that Count Three of the indictment in the case at bar was a good indictment under the Volstead Act on a charge of selling liquor in violation of Sections 3 and 29 of said Act. (*Farley v. U. S.*, 269 Fed. 721.) In the Farley case this Court said:

“Nor was it necessary for the government to prove that the defendant was engaged in the business of a retail liquor dealer. It was enough to show that he sold liquor in any quantity.”

It is urged by plaintiffs in error that the evidence was not sufficient to justify conviction on Count One of the indictment and that the verdict on Count One was inconsistent with the verdict on Counts Two and Four.

The questions involved here were all presented by counsel for defendants upon their Motion for Judgment Notwithstanding the Verdict, and for a New Trial in the Court below. In passing upon those motions, Judge Jennings said:

“Charles Miller and John Engblad were indicted on five counts. Count one charges that on the 9th day of December they had in their possession in and on the premises known as the Alaskan Cafe, certain intoxicating liquor, to-wit, whiskey. Count 2 charges, that on said date and on said premises they did wilfully and unlawfully sell to Richard H. Gleason intoxicating liquor, to-wit, whiskey. Count 3 charges that on the said date and at the said place they did wilfully and unlawfully carry on the business of retail liquor dealers. Count 4 charges that on said date, and in and on said premises, they did wilfully and unlawfully sell to one James O’Brien intoxicating liquor, to-wit, whiskey. Count 5 charges that on said date, and at said place they did sell to one Richard H. Gleason intoxicating liquor, to-wit, whiskey, the said Gleason being then and there in the uniform of the United States Army. The evidence at the trial developed the fact that there was only one sale to Richard H. Gleason, and the Court thereupon compelled the presecutor to elect whether he relied upon Count 2 or Count 5. The District Attorney replied that he relied on Count 2, whereupon the Court dismissed Count No. 5.

“The jury by their verdict found the defend-

ants guilty on Counts Nos. 1 and 3, and not guilty on Counts Nos. 2 and 4—that is to say, the jury found the defendants were guilty of having in their possession on the 9th of December, and in and on the premises known as the Alaskan Cafe, intoxicating liquors; and it also found them guilty of carrying on the business of retail liquor dealers in said premises and on said date without having first paid the special tax as required by law; and it found them not guilty of having made the sales complained of to said Gleason or to said O'Brien.

“Counsel for defendants now moves for a judgment of dismissal of Count 3, and calls the attention of the Court to *Farley v. U. S.*, 269 Fed 701 (1st page advance sheets under date of March 31, 1921), wherein the Court held that the Volstead Act repealed those sections of the R. S. U. S. which had to do with the collection of revenue from distilled spirits. Counsel for the Government, while not questioning the decision in the said *Farley* case, calls attention to the fact that the said decision went further than holding that the section of the R. S. U. S. in question was repealed by the Volstead Act, in that it laid down the proposition that if an offense was charged and proven under any other act a conviction could be sustained even though the indictment purported to be under some section of the R. S. U. S. which had been thus repealed by the Volstead Act, and so, his contention is, while the judgment of guilty on the third count of the indictment could not be sustained if considered only as relating to the said R. S.

U. S., still it could be sustained under the evidence in this case because, as he alleges, the evidence shows that the defendants were conducting or aiding in conducting, or associated with others in maintaining, a common public nuisance under section 19 of the Volstead Act.

“Section 19 of the Volstead Act is aimed at the declaring those places to be nuisances where alcoholic liquors are manufactured, stored, sold or vended * * * contrary to law. It is true the section further provides that

“ ‘any person who shall maintain or shall aid or abet, or knowingly be associated with others in maintaining such common public nuisances, shall be guilty of a misdemeanor.’

“Nevertheless it is obvious that in order to charge a crime under that section, the indictment must allege, 1st, that the place was a common public nuisance; 2nd, that the defendants either maintained it, or aided or abetted, or were knowingly associated with others in the maintenance of such common public nuisance. In Count 3 of the indictment there is no charge that the defendants, or either of them, maintained the Alaskan Cafe, or aided or abetted, or were knowingly associated with others in maintaining that cafe,—only that they carried on the business of retail liquor dealers in and on those premises without a license.

“However, in the Farley case the Court said:

“ ‘A cursory reading of the indictment in view of the prohibition act, leads to the conclusion that it is sufficient to charge a

sale of intoxicating liquor within the purview of section 3, title 2.'

"The report in the Farley case does not set forth the indictment, and it may be that in the indictment in that case the defendants were charged with carrying on a retail liquor business, and instances given of the sale of liquor.

"While the third count of the indictment does not state the crime of maintaining a public nuisance, yet when it is considered that the 32nd section of the Volstead act provides that 'it shall not be necessary in any affidavit, information or indictment to give the name of the purchaser or * * *', and that the count in question charges that a crime was committed 'by then and there selling and offering for sale,' the count is sufficient to charge a sale, and if it be sufficient to charge any offense, then under the Farley case the requirement of the law is fulfilled. The verdict on that count would then be construed to be a verdict of guilty of selling intoxicating liquors. Counsel for the defendants insists that if that be the verdict of the jury it is contrary to their verdict finding the defendants not guilty of the offense charged in the 2nd and 4th counts—that is, of selling to Gleason and O'Brien; but how is the Court to choose between the two verdicts?

"Defendants also contend that they cannot be sentenced under Count 1 of the indictment. That count charges that on that day and at that place they had possession of whiskey. The verdict of not guilty as to the 2nd and 4th counts is a verdict to the effect that they did

not sell any whiskey on that day and at that place either to Gleason or O'Brien, but nevertheless, the jury found by their verdict that on that day and at that place they were in possession of whiskey. Counsel for the defendants contend that there is an inherent contradiction in these two verdicts—that the jury could not find the defendants guilty of having liquor in their possession if it found them not guilty of selling to Gleason and O'Brien, for the reason that the only evidence of any possession by the defendants is the evidence of Gleason and O'Brien as to the sale to them, and that by finding the defendants not guilty under Counts 2 and 4 the jury showed that they did not believe any of the evidence of the said Gleason and O'Brien; but this conclusion does not necessarily follow, for the jury might have believed some of Gleason and O'Brien's testimony and disbelieved the remainder. They might have believed that although the defendants had liquor in their possession, they did not sell it to Gleason and O'Brien.

“The motions for a new trial and an arrest of judgment will be denied, and the defendants sentenced under the verdict of the jury.”

Counsel for plaintiffs in error direct attention to the fact that they demurred in the Court below to the indictment and urged that the demurrer be sustained as to Counts One, Two and Four for the reason that said Counts charged the selling of intoxicating liquor, which is particularly described as “whiskey containing more than one-half of one per

cent of alcohol by volume." That while the selling of commercial whiskey is prohibited under the Alaska Bone Dry Law it was not a crime to sell a beverage containing more than one-half of one per centum of alcohol by volume, unless it was shown that the beverage was intoxicating in fact. The words "containing more than one-half of one per centum of alcohol by volume" were surplusage in an indictment under the Alaska Bone Dry Law. As counsel states, that law provides that it shall be unlawful to possess intoxicating liquor. But in Section 1 of the Alaska Bone Dry Law we find the following definition:

"Whenever the term 'liquor,' 'intoxicating liquor,' or 'intoxicating liquors' is used in this Act it shall be deemed to include whiskey, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol and all malt liquors including all alcoholic compounds classed by the United States Internal Revenue Bureau as compound liquors.' "

Under that provision of the Alaska Bone Dry Law it was only necessary for the Government to prove that the liquor possessed by the defendants was whiskey. When that was proved, as it was in this case (Tr. p. 11) the fact of its being intoxicating liquor was established, and it was unnecessary for the Government to show the per centum of alcohol contained in the liquor which came within the definition of intoxicating liquor under the Alaska Bone

Dry Law. As a matter of fact, however, the Government did prove by witnesses who were familiar with whiskey and the taste and intoxicating effects thereof, that the liquor possessed by defendants as charged in Count One of the indictment was in fact intoxicating. (Tr. p. 11, p. 17.)

“(U. S. C. C. A. Ill. Opinion evidence of users of whiskey held admissible to prove that beverages contain more than one-half of 1 per cent of alcoholic content. (*Lewisohn v. U. S.*, unreported to date).”

We submit, for the reasons herein stated, that the judgment of the Court below should be affirmed as to Count One of the Indictment; and the cause as to Count Three be remanded for resentence on said Count Three in pursuance of the National Prohibition Act.

Respectfully submitted,

A. G. SHOUP,

*United States Attorney for Defendant
in Error.*

